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THE
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OR
QUARTERLY JOURNAL OF JURISPRUDENCE.

No. LIX.

ART. I.—OUR PATENT LAWS: THEIR ORIGIN
AND POLICY, WITH SUGGESTIONS FOR
THEIR AMENDMENT. By JOHN LASCELLES,
Esq., Barrister-at-Law.

AT no remote period, our patent laws will engage the attention of the Legislature, and upon its right determination respecting them depend the interests of that large class of inventors which England has the good fortune to possess, and whose genius and perseverance have done so much towards giving her that supremacy in manufacturing industry which she has long enjoyed without dispute. Some of us are perhaps actively connected with manufactures which have been created and improved by inventive genius, and which are still capable of greater improvement. Others, perhaps, only take a general interest in the subject, and yet that general interest cannot fail to be a deep interest, if we realise the effect which enterprise of this kind has had upon the welfare of the country at large and of ourselves individually, by cheapening and improving articles of utility and of daily requirement.

Whether the patent laws should be amended or abolished, and if amended, how they should be amended, so as to make

them beneficial both to inventors and to the people at large, is a question which has a politico-economical importance, which belongs to few branches of law reform. False steps may be taken in our attempts to improve most other branches of the law, without any more serious effect than causing unnecessary expense and trouble to be incurred, by the individuals who happen to come within the operation of the laws which have been dealt with; they seldom have a prejudicial effect upon the well-being of the people at large, and they rarely put a direct check upon the national prosperity and advancement. With respect to amendments of the patent laws, however, the case is different.

Good patent laws are the great stimulus which induces inventors to persevere till they have reduced their ideas to practical and useful forms, and according as we amend them upon sound or false principles, will the inventive genius of the nation continue to contribute to our prosperity and advancement, by the production of inventions which perseverance and industry have made perfect and practically useful; or will languish and decay, giving us nothing but crude ideas and philosophical toys, of no use either to the public or to the inventors themselves.

We propose first to discuss the justice and policy of our patent laws as a general question, and then to enter into some of the amendments by which we think they may be improved and made more conducive to the encouragement of inventive genius—the object which should be kept constantly in view in dealing with this branch of law reform. We think, however, we shall make ourselves more easily intelligible if, before proceeding to the discussion of either of these divisions of our subject, we give a short account of the origin and history of the laws of which we are about to treat, and of their principal provisions as they now exist. We find from the early history of our manufactures, that during many ages after the Norman conquest, the English were not proficient in the cultivation of the industrial arts,

and that, though they had sufficient energy and perseverance to work branches of industry which others had shown to be profitable, they seldom originated arts or manufactures for themselves. It thus became the policy of the kings of England to induce foreigners to introduce their arts and manufactures, and in order to do so, they exercised a part of the recognised prerogative of the Crown in granting them "privileges," conferring valuable rights and immunities with respect to the working of the arts and manufactures which they introduced. In these grants of "privileges" to foreigners, we find the origin of our present practice of granting letters patent to inventors.

So long as our sovereigns confined themselves to grants of this description, this exercise of their prerogative was wise and beneficial, for it gave their subjects the immediate advantage of arts and manufactures of which they would otherwise have been for a long time deprived. These "privileges," however, were not granted, without the reservation of valuable rights to the grantors, and the cupidity of our successive monarchs led to such abuses, that, in the time of the Tudors, the Crown was in the habit of selling monopolies for the working of manufactures which were not new, and for the sale of articles, the manufacture of which had long been known to their people. This practice was carried to such an extent in the reign of Elizabeth, that the national prosperity was fast sinking under it; and when the subject was brought before the House of Commons in the 41st year of her reign, it was found that the salt, iron, powder, brush, earthenware, sea-coal, train-oil, bottle, and almost all other trades were carried on under monopolies, which had been sold by the Crown, or given to courtiers. The examination which the subject then underwent, and the disclosures which were made, drew public attention to the question, and called forth such a strong expression of opinion against the grants which had been made, that some of them were immediately cancelled. The abuse was, however, continued in the time of James I.,

until it was finally abolished by the well-known Statute of Monopolies in the 21st year of his reign. A proviso in this Statute reserved to the Crown the right of granting letters patent and grants of privilege for the term of fourteen years or under, for the sole working or making of any manner of new manufactures within the realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters patents and grants, should not use.

This proviso is the foundation of our modern patent law. The Statute of Monopolies has been amended and improved by various Statutes, which it is not necessary for us to mention particularly, and into the details of which we shall not enter at present. At this stage of our enquiry, it will be sufficient for our purpose to state the general effect of them, leaving such of the details as we intend to notice, to be stated when we begin to treat of some amendments of the law which we think would be advantageous. The general effect then of the Statutes now in force relating to the granting of letters patent for inventions is as follows:—Any true and first inventor of a new art or manufacture, or any one who is the first introducer into this country of a foreign art or manufacture, can, upon certain conditions, to be noticed hereafter, have granted to him, his executors, administrators, and assigns, the exclusive right of making, using, exercising and vending such new art or manufacture, within the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, for the space of fourteen years from the date of the grant. One of the conditions, upon which this exclusive right is granted, is, that the letters patent shall cease and be void, if at any time during the period for which they were granted it be made to appear to the Sovereign, her heirs, or successors, or to any six or more of the Privy Council, that the grant is contrary to law, or prejudicial or inconvenient to the subjects in general, or that the invention, at the time of the grant, was not a new invention as to the public use and

working thereof within the United Kingdom of Great Britain and Ireland, the Channel Islands, and the Isle of Man, or that the patentee was not the true and first inventor thereof within the realm.

Another condition is, that the grant shall become void : if the patentee, his executors, or administrators, neglect to particularly describe and ascertain the nature of the invention for which the patent has been granted, and in what manner it is to be performed, by an instrument in writing under his, or their, or one of their hands and seals, and to cause such instrument to be filed in the Great Seal Patent Office, within six calendar months next and immediately after the date of the letters patent ; or if the patentee, his executors, administrators, or assigns neglect to pay a stamp duty of fifty pounds, and to produce the letters patent, stamped with a proper stamp to that amount, at the Office of the Commissioners of Patents for Inventions, before the expiration of three years from the date of the letters patent ; or if he, or they, neglect to pay a stamp duty of one hundred pounds, and to produce the letters patent, stamped with a proper stamp to that amount, at the Office of the Commissioners of Patents for Inventions, before the expiration of seven years from the date of the letters patent ; or if he, or they, neglect to supply, or to cause to be supplied, for the public service, articles manufactured by means of the invention, for which the letters patent have been granted, in the manner, at the times, and upon the reasonable prices and terms settled by the officers or commissioners requiring them.

Moreover, if the art or manufacture for which a patent has been granted in this country was first invented in a foreign State, or by any subject of a foreign State, and a privilege of the nature of a patent has been obtained in such foreign State, before the date of the grant of letters patent in England, it is provided, that the privilege granted in England shall cease, on the ceasing of the like privilege

in such foreign State, or if more than one such privilege has been obtained abroad, immediately upon the expiration or determination of the term of such privilege which shall first expire and be determined; and that if such privilege in England was granted after the expiration of the term for which a patent or like privilege, obtained in any foreign country, was granted, or was in force, such privilege shall not be of any validity. If a patentee observe the conditions which we have mentioned, the Crown has power to extend the term of his patent, for any time not exceeding fourteen years beyond the fourteen years for which it was originally granted, provided the Judicial Committee of the Privy Council report that such extension ought to be allowed. The provisions of our patent law, which we have noticed, are sufficient to show, that the law of England does not allow an inventor to have the exclusive use of his invention, without imposing many stringent conditions upon him. We shall now proceed to the first direct issue we intend to discuss, which is, that the practice of granting to true and first inventors the exclusive use of their inventions for a limited period, and upon certain conditions, devised in order to prevent the grants from being seriously inconvenient or injurious to the people in general, or detrimental to the public service, is just and politic.

The discovery of a new art or manufacture is the result of labour and expense, and if exclusive property has any ethical foundation at all, its foundation is that universally admitted right, which every man is considered to have, to enjoy the fruits of his own ability and industry. The persons who argue against the justice of allowing inventors to have an exclusive right to the use of their inventions for a limited period, are generally misled either by a confusion of ideas or by ignorance of facts. The confusion of ideas to which we refer is caused by their recollection that modern patents are granted by virtue of a part of the prerogative of the Crown, which was retained by the Statute of Monopolies. They

remember the indefensible monopolies which were abolished, and then a false association of ideas, to which some minds are liable, causes them to call patents monopolies, and to think they must necessarily be condemned. The word monopoly has acquired a peculiar meaning. No one thinks of calling your property in the coat which you have bought with the result of your labour a monopoly; no one thinks of saying that your exclusive right to publish the book, which your genius and industry have created, is a monopoly; and yet directly the genius and industry of an inventor have been rewarded by the discovery of a new art or manufacture, for which he has obtained a patent, there are numbers of men who call his exclusive right to the use of his invention "a monopoly," and condemn it, without further consideration, as something which is necessarily unjust and indefensible.

Ignorance of facts, the other source of error to which we have alluded, is less excusable than the one just noticed. We are sometimes told by the press, and by persons with whom we come in contact, that inventions are bright ideas, which often occur to several men at about the same time, and that, in a country where there are patent laws, the inventor who is fortunate enough to arrive first at the Patent Office obtains the right to debar his fellow discoverers from the free use of their own inventions.

Now, any one who has even a slight acquaintance with the history of inventions is aware that, though the first idea of an invention has sometimes occurred to the inventor suddenly, its development and working-out have only been accomplished by great labour and at great expense. Indeed, a little reflection on the subject, without any absolute historical knowledge, is sufficient to convince us that inventions are not brought to perfection without many fruitless experiments, and a large expenditure both of time and money. The first idea of the separate condenser occurred to Watt as he was walking across the College green at Glasgow. It was years before he succeeded in making a satisfactory steam engine on that principle.

It took many years more, and the labour and genius, not of one man, but of many men, to bring to perfection the wonderful machines which now drive our mills and draw us along our railways at the rate of forty-five or fifty miles an hour. That inventions are only brought to perfection by the labour of inventors, is a proposition so obviously true to every one who takes the trouble to reflect upon the subject, that we think it is unnecessary to support it by further examples and arguments. This being so, we believe that few men who realise it, will venture to argue that the laws of this country would be just, if they allowed the public to take the benefit of their inventions without paying for it. If our laws permitted this, they would have the effect of placing inventors—who must be admitted to be public benefactors—in a worse position than they would have been in if, instead of following the bent of their genius, and making valuable discoveries, they had wasted their time in idleness, or had devoted themselves to common-place employment. After spending their time and money in bringing their inventions to perfection, directly their industry and perseverance had made them valuable, inventors, under such laws, would be obliged to compete, in the use of their own inventions, with opponents who had reserved and accumulated their capital, instead of spending it in mechanical or scientific experiments, and who would consequently be in a position to work them to greater advantage than they could do, and to drive them out of the market.

It may, however, be said, that though the abolition of the patent laws would be a hardship to inventors, it would be an advantage to the public, and that the interests of individuals should be made to yield to the interests of the people at large. A further examination of this question will show us that, in addition to being unjust to inventors, the abolition of the patent laws would be highly impolitic. There are in this country a certain number of men possessed of those peculiar mental characteristics which constitute inventive genius, and it

is of the utmost consequence to the nation, that it shall have all the advantages which they can give it, by the most diligent exercise of their special abilities. In order that this may be the case, two things are necessary; (1.) Inventors must have sufficient inducement to make them devote themselves to the kind of labour for which nature has peculiarly fitted them; and (2.) The public must be quickly put in possession of accurate descriptions of their discoveries. We have something to say upon each of these points.

Under laws which allow inventors to protect their inventions by means of letters patent, every man of inventive genius is stimulated to use his abilities to the utmost of his power, in the hope that he will succeed in making a discovery which, when so protected, will enable him to realise a fortune. It is true that many inventors fail to gain the object of their desires; but it is also true that some of them succeed in doing so, and that all hope to be among the fortunate. Genius, however great it may be, can only be made effective in the production of useful results by means of continuous labour and self-denial, and these are seldom submitted to, unless circumstances provide an incentive to action in the hope of material gain. The hope of personal distinction is, no doubt, sufficient to stimulate some men of genius to the necessary diligence; but we must not forget that men so influenced must always be few in number, since they must belong to the very limited class of individuals in whom genius and great ambition co-exist with inherited wealth. Moreover, only a very small proportion of the useful inventions, by which the details of valuable machines are improved, and the public is benefited, bring sufficient distinction to the inventors to be any incentive to action to persons of the class in question. We must not, therefore, allow ourselves to be deluded by the hope of having the free use of such discoveries, as may be made by the very limited number of men, whose wealth and rare mental and moral qualities lead them to be diligent in following the bent of their genius, either for

the pleasure of doing so, or from the hope of achieving distinction. What we should seek to obtain is the highest development of which the inventive genius of the nation is capable; and if we are wise, we shall do our utmost to provide circumstances calculated to stimulate our inventors to activity, and to give them encouragement. We know of no way in which this can be better and more reasonably accomplished than by insuring to them the just reward of their labours, as far as this can be done by legislation. If the patent laws were entirely abolished, we think it is certain that a very large proportion of the inventive ability of the country would be at once devoted to more profitable employment than trying to make discoveries, which, if made, would at once become public property. Some men would, perhaps, still continue to invent, but the people would derive little benefit from their discoveries, for they would either leave them in a crude and useless state, as did the celebrated Marquis of Worcester, or they would take care to devote their attention to those branches of industry in which improvements are capable of being kept as trade secrets. In either of these events, the march of practical improvement, in many important arts and manufactures, would be retarded, if not altogether stopped.

Under our patent laws, a patent, as we have seen, is granted to an inventor on the express condition that he will, within six calendar months from the date of the grant, file a specification, accurately ascertaining and describing his invention, and the manner in which it is to be performed, in the Great Seal Patent Office. This specification is required to be sufficiently explicit to enable any workman of average capacity to understand it, and to make use of the invention, and it can be obtained at a moderate cost by any one who wishes to have it. Thus, on the expiration of the term of the patent, any man of average capacity who chooses to do so, can make use of the invention almost as easily as if he had himself been the inventor. If we were

to abolish the patent laws, an attempt would at once be made, by means of trade secrets, to make the exclusive use of inventions perpetual. This attempt might succeed or it might not. If it did succeed, the prices of articles produced by the trades which were successful in keeping their secrets would be permanently kept up, to the injury of all consumers. If it did not succeed, the secrets would generally be divulged by workmen, who, in many instances, would be unable to describe them with accuracy; and in those cases in which accurate descriptions were given, the secrets would not be likely to spread fast, for the persons who obtained them, having done so by the payment of heavy bribes, would, in their turn, guard them with the greatest care. The prices of commodities, produced under the limited competition which would be thus established, would be kept up for an indefinite period, and inventions which, under good patent laws, would soon have become the common property of the people at large, without them would remain the property of a few individuals, and would be used by them in extracting money from their customers, some of which, under the provisions of judicious patent laws, would certainly have remained in their pockets.

It has been suggested that inventions should be divided into two classes, the first class consisting of what may be called "great discoveries"; the second, of inventions of minor importance, and of improvements in the details and construction of machines already in common use; and that inventors who succeed in making discoveries of the first class, should be allowed to protect themselves by means of letters patent, but that such protection should be denied to those whose inventions come within the second class. In order to carry out this idea, it has been proposed, that it should be the duty of officers of the Crown to go into the merits of inventions submitted to them by applicants for protection, and to withhold letters patent from all inventors whose inventions are not considered by them of sufficient importance to be

ranked as first-class discoveries. We think a little reflection will show that any such attempt to classify inventions, or the exercise of any such discretionary power on the part of the officers of the Crown, would be a capital error. Nearly every machine of importance has been brought to its present state of perfection by means of the joint labours of a large number of independent inventors, each of whom has improved upon the discoveries and contrivances of his predecessors, sometimes by the addition of valuable details, sometimes by the application of superior principles of action.

In some instances these improvements have been so numerous and so important, that the machines of the original inventors are little more than foundations for the magnificent superstructures, which successive inventors have raised upon them for our use and admiration; and it cannot be doubted that the great incentive to the industry which produced these results, was the protection and encouragement afforded by our laws, to the inventors of improvements in the details of machines already in use.

If such protection and encouragement had not been given, we think it is certain that a very small proportion of the improvements in question would ever have been made, and that instead of having steam engines, and machines for the making of textile fabrics, which are the wonder of the world, we should have had little more than reproductions of the comparatively rude contrivances which are now preserved as curiosities at the museum of the Patent Office. The same incentive is still active in stimulating our inventors to the continual improvement of the various machines, upon which our individual comfort and our national greatness so largely depend, and we are convinced that it could not be withdrawn without most serious and prejudicial consequences to the one and to the other.

The refusal of the protection afforded by letters patent to inventors, whose inventions appeared to the officers of the Crown to be of minor importance, would not be productive of

such disastrous consequences, as the refusal of the like protection to the inventors of improvements in the details of machines already in use. We think, however, that the exercise of any such discretionary power, as to the granting or withholding of letters patent, should be condemned. It would have a most depressing effect upon the invention of articles, which, though not of first rate importance, are of great public utility, and in some instances, prejudice, and want of insight into the merits of the inventions submitted to them, on the part of the officers of the Crown, or of the skilled persons consulted by them, would lead to the repression of first rate discoveries. It is well known that many inventions, which have ultimately been proved to be of the greatest importance, have been condemned by men, whose opinions were treated with the greatest deference by the age in which they lived. Men who were, at the time, considered competent authorities, said that the propulsion of ships by means of steam could never be a commercial success; and the lighting of towns, by means of coal gas, was once pronounced to be an impossibility by a man who had achieved the greatest distinction in chemistry and science.

The most determined opposition of men who were honest, but who failed to appreciate its merits, and of men whose personal interests were adverse to its success, was the ordeal, through which nearly every great discovery had to pass, before its value was realised and admitted. This opposition was often so strong, and was supported by such a weight of authority, that only the enthusiasm of an inventor could have supplied the perseverance which ultimately conquered it, by such an exhibition of success, as an accomplished fact, that it could not any longer be doubted. It is true that inventors are often deluded by hopes which can never be realised, and are obliged to abandon, as impracticable and useless, the schemes upon which they have spent much time and money. Under laws, however, which allow letters patent to be obtained for any improvement in an art or manufacture, in

the utility of which the inventor has confidence, we have the best possible guarantee that no invention will be prematurely abandoned; for every invention, for which a patent has been taken, is sure to be tested, to the utmost of his ability to do so, by a man who has a direct interest in its success, and who is stimulated to attempt to overcome all obstacles, by a firm belief that he will ultimately succeed in overcoming them.

We have given a general outline of the origin and history of our patent laws, and have stated some of their principal provisions as they now exist; we also have made some observations on the justice and policy of laws, devised so as to allow every inventor to obtain a fair and reasonable reward for his ability and industry, without causing serious injury or inconvenience to the people in general, or to the public service. We shall now proceed to notice some amendments, by which we think our patent laws may be made more conducive to this end; and the first point to which we shall direct our attention, is the machinery by which they are administered. The Commissioners of Patents for Inventions are the Lord Chancellor, the Master of the Rolls, Her Majesty's Attorney-General for *England*, Her Majesty's Solicitor-General for *England*, the Lord Advocate, Her Majesty's Solicitor-General for *Scotland*, Her Majesty's Attorney-General for *Ireland*, and Her Majesty's Solicitor-General for *Ireland*, for the time being respectively, together with other persons appointed by Her Majesty. To the Lord Chancellor and the Commissioners of Patents is intrusted the administration of that part of the patent law which relates to the granting of letters patent for inventions, while questions respecting rights and liabilities under the patents, after they have been granted, are determined by the ordinary Courts of Law and Equity. A glance at the titles of these officials is sufficient to show us that they are not likely to have any special qualifications for the administration of this branch of the patent law. We are also aware, that the time of the Law Officers of the Crown is

so fully occupied by other business, that it is impossible for them to devote proper attention to the specifications referred to them, and we come to the conclusion that this part of the public service must, necessarily, be conducted in a careless and inefficient manner. This is, in fact, the case, and yet the cost of maintaining it is so great, that if the money were more judiciously applied, in addition to paying for the administration of that part of the patent law now under our consideration, in a much more efficient manner than it is now administered, it would be sufficient to enable us to provide a special court for the trial of all questions respecting patent rights, to the great relief of the ordinary courts of the country, and to the great advantage of patentees, and of all persons having interests under patents.

The above considerations are sufficient to show us, that our first step in Patent Law Reform should be to enact, that the Lord Chancellor, the Master of the Rolls, Her Majesty's Attorney-General for *England*, Her Majesty's Solicitor-General for *England*, the Lord Advocate, Her Majesty's Solicitor-General for *Scotland*, Her Majesty's Attorney-General for *Ireland*, and Her Majesty's Solicitor-General for *Ireland*, for the time being respectively, together with all other persons who are now Commissioners of Patents for Inventions, shall cease to be such Commissioners, and that the ordinary Courts of Law and Equity shall cease to have jurisdiction in cases involving the consideration of patent rights. The ground having been thus cleared, our next step should be the establishment of a system of patent law administration of such efficiency, that it would be of real service, both to inventors and to the public. In order to accomplish this, we propose that a sufficient number of men should be selected for their special fitness for the duties which they would have to discharge, and that they should be appointed Commissioners of Patents for Inventions, and also Judges of a Patent Court, which should be established

for the trial of all causes involving the consideration of patent rights. It would not be difficult to find men, who would be both willing and well qualified to undertake the administration of the patent laws in all their departments, and the services of a sufficient number of such men should be secured for this purpose. To these officers, who would be both Commissioners of Patents for Inventions and Judges of the Patent Court, should be handed over the entire administration of the law of patents, and they should be given exclusive jurisdiction in all questions arising under it. The granting of letters patent for inventions, and the determination of disputes respecting them after they had been granted, would thus belong to one department of the public service, and would be under the administration of one set of officials, and we think that this concentration of jurisdiction and authority would be both advantageous and economical. As Commissioners of Patents, these officials should be charged with the duty of examining applications for patent rights, and of granting letters patent, and they should be provided with a seal with which letters patent should be sealed instead of with the Great Seal. As judges of the Patent Court they should, in cases within their jurisdiction, have all the powers now exercised by the judges of the Superior Courts, both of Law and Equity; they would then have concentrated in themselves all the powers necessary to enable them to do complete justice between the parties coming before them.

Each case should be tried by a single judge in the first instance; from his decision an appeal should lie to the full Court, and the decision of the full Court should be final. Trial by jury should be abolished in all cases within the jurisdiction of the Patent Court, questions both of law and of fact, in the cases coming before them, being determined by its judges alone. We should then cease to commit the absurdity of charging any twelve men who chance to be called into the jury box with the determination of questions, which can only be fully understood by persons who have had

a special training, and who have peculiar mental characteristics. For the purposes of patent law administration, the United Kingdom should be divided into districts, and a judge of the Patent Court should sit, at fixed intervals, in some central town in each district, and should try all causes which had arisen therein.

The next point to which we shall direct our attention, is the employment of what are called "skilled witnesses." Witnesses of this kind, in addition to deposing to facts within their knowledge, are allowed to give their opinions on points respecting the matter in dispute, as to which they are considered to be skilled, and their employment is, in our opinion, the great curse of modern litigation. We say this advisedly, for it is well known that scarcely any case is so desperate that witnesses of this character, and sometimes men of eminence, cannot be retained to give evidence in support of it, to the great cost of the parties, and at the risk of a failure of justice. Sometimes an arbitrator who has listened for days to the examination, cross-examination, and re-examination of the skilled witnesses produced by the parties, is at last reduced to such a state of doubt and perplexity by their swearing and counter-swearing, that he finds it necessary to take the opinion of a man of his own selection, who is skilled as to the matter in dispute. When this occurs, the arbitrator is of course guided in coming to his decision by the opinion which he has thus obtained, since it is the only opinion before him which has not been given by a partisan, brought forward and paid to support a particular view of the case; the opinions expressed by the skilled witnesses called by the parties are entirely disregarded by him, and much time and money is wasted, which might have been profitably employed in some other way, if the expression of such opinions had been prohibited, and the arbitrator had done at first what he was compelled to do at last. The above example of what sometimes happens in arbitration cases, both illustrates the evil which we are now considering, and suggests its remedy.

In the Patent Court, and in all courts for the trial of civil cases, the witnesses called by the parties should be required to depose to facts within their knowledge alone, and should not be allowed, under any circumstances, to give their opinions respecting the points in dispute. If, however, either of the parties was anxious to have the opinion of a skilled witness given at the trial of his cause, it should be open to him to apply to the Court or to a judge at chambers, to appoint one. If satisfied that it would be necessary or desirable that the opinion of a witness, who was skilled as to the matter in dispute, should be given in evidence at the trial of the case, the Court or judge so applied to, should have power to grant the application, and to select and to appoint one or more such witnesses to attend for that purpose, every witness, so selected and appointed, being considered to act as an officer of the Court, and being entirely independent of both the parties. In cases where a view was required, the parties or their agents should be allowed to accompany the witness or witnesses to take it, in order to point out the matters to which they thought attention ought to be directed. At the time and place appointed for that purpose, the witness or witnesses should appear, and should give evidence when required by the Court to do so; the counsel of either party to the cause having a right to cross-examine each skilled witness, in order to ascertain whether he had duly considered all things necessary to be considered in forming a sound and reliable opinion. If this cross-examination showed that any skilled witness had overlooked some points to which he ought to have directed his attention, the Court should have power, either to remit the case back to him for further consideration, or to select and appoint one or more additional skilled witnesses to consider the matter on which information was required, and to give evidence respecting it.

When an action is brought for the infringement of patent rights, the defendant is allowed to dispute the validity of the

plaintiff's patent, if he give him notice of his intention to do so. In this notice the defendant must give explicit information as to the objections to its validity upon which he intends to rely, and if at the trial of the cause he succeed in establishing any of them, the plaintiff is defeated in his action and has to pay the costs. Now, though the plaintiff may thus be defeated in his action for infringement, on the ground that his patent is invalid and ought to be cancelled, it does not thereby become void; for, as our law now stands, a patent does not become void, until it has been declared to be so in a suit brought expressly to try the validity of the grant. The legal proceeding required by our law for this purpose is prosecuted in the name of the Queen, and is called a writ of *scire facias*. Any person may petition Her Majesty to direct a writ of *scire facias* to try the validity of a patent, and the petitioner who puts the law in motion is liable for the costs of prosecuting the writ, and is also required to give a bond to secure the patentee's costs in the event of its failure. The evidence required in a proceeding of this kind is similar to that which is required in an ordinary action for infringement, in which the validity of the patent is disputed, and if the verdict is for the Crown, the patent is void and the Court orders it to be cancelled. Now the interests of the public demand, that patents which ought to be cancelled shall be cancelled as speedily as possible, so that all persons wishing to make use of the arts and manufactures described in the specifications, may know that they are at liberty to do so. In order to protect these interests, we propose that it shall be the duty of any judge of the Patent Court who tries an action for infringement, in which the validity of the patent is disputed, to order it to be cancelled, if it be proved to his satisfaction that it ought to be cancelled, sufficient time, however, being allowed for an appeal to the full Court, between the date of his order and the date fixed for its execution.

There are many other particulars in which our patent laws require to be simplified and otherwise improved, but we are

obliged to leave them unnoticed; and we regret that we have been unable to give more than mere outlines of the few amendments which the space at our disposal has allowed us to suggest; we must leave our readers to supplement these outlines by their own knowledge and reflection.

ART. II.—DIGESTS AND CODES.

A Letter to the Lord Chancellor concerning Digests and Codes.

By W. R. FISHER, of Lincoln's Inn, Barrister-at-Law.
London: Butterworths. 1870.

WE need no apology for calling the attention of our readers to the above-named publication. Mr. Fisher has an especial right to put forward his views upon the subject indicated, not only by virtue of his position as one of the foremost text-writers of the day, but yet more because he is one of those who were selected by the Digest Commissioners to prepare a specimen Digest under their supervision.

Possibly our readers may not remember the precise position of the question at the present moment. The Law Digest Commission made their first Report in 1867. Thereby they declared their opinion that the construction of a Digest was desirable: and further advised that, as a preliminary and experimental step, a portion of the contemplated Digest, sufficient in extent to be a fair specimen of the whole, should be in the first instance prepared. In conformity with these recommendations, three several branches of the law were selected to form the subjects of specimen Digests. These specimen Digests were to be constructed under the supervision of the Commissioners by gentlemen nominated by them, and were designed to precede the actual commencement of the task of preparing an entire Digest of the Law.

Mr. Fisher was selected to construct one of these specimen Digests, the subject committed to his charge being the Law of Mortgage and Lien. Upon this task Mr. Fisher was engaged for some time, and it is understood that a considerable portion of the work has been completed. In the present year, however, the Commissioners have made another Report. Therein they state, that although the specimen Digests are not yet complete, the task has already served its purpose by enabling the Commissioners to form conclusions as to the conduct of the entire work. They therefore recommend "that the work of a general Digest, based on a comprehensive plan, and with a uniform method, should be at once undertaken," and that it should be carried on under the supervision of a permanent board of professional men of the highest skill, whose whole time should be given to the task, and who should be highly remunerated. The specimen Digests, so far as already complete, would be available as materials for the construction of the entire work.

From this Report Mr. Justice Willes dissents. His Lordship states his opinion to be that a Digest would after all be only a make-shift for a Code, and advises that, instead of a Digest, the construction of a Code should be immediately commenced.

Hereupon comes Mr. Fisher's letter. He addresses himself especially to the views expressed by Mr. Justice Willes, and shared with him by many others. Mr. Fisher endeavours to show that these views are erroneous. His contention is that the completion and publication of a Digest should precede any attempt directly to form a Code. Not that he is in any way opposed to codification; on the contrary, he agrees with Mr. Justice Willes in regarding a Code as the ultimate object to be aimed at, but he prefers to approach it through and by means of a Digest, in preference to attacking it at once.*

* Mr. Austin appears to have been of the same opinion. See his collected works, Vol. III., pp. 279, 281, *et seq.*

He, therefore, upholds the opinion of the majority of the Commissioners upon this point, as against that of Mr. Justice Willes. Mr. Fisher contends with great force that the compilation of a Digest will give opportunity and time for the acquisition of experience; that upon the publication of the Digest, errors and imperfections in the work will be detected and removed with comparative ease. The more serious defects and contradictions in our law will then be clearly seen, and may be corrected by the Legislature, the jarring systems of Law and Equity fused, and all things prepared for the introduction of a perfect exposition of the law. The construction of a Code will then be a matter of comparative ease, for not only will the completed Digest serve as the foundation of the Code, but its very language will in most cases be transferred directly into the pages of the Code. At the same time all imperfections which may have been detected in the Digest will be carefully avoided. Not only will the Code, under such circumstances, be constructed with ease, there will also be all reasonable certainty that the work will be well done, and that the Code, when it at length appears, will be a good one. If, on the other hand, an attempt be made to construct a Code directly without the intervention of a Digest, Mr. Fisher obviously fears that the work may be characterised by serious imperfections. The latter was the course adopted in the case of the (so-called) Codes of New York. Upon these we have lately commented (see our previous numbers for August and November, 1869, and for May, 1870), and we observe, with some satisfaction, that Mr. Fisher's estimate of their value agrees with our own. He, like ourselves, is compelled to regard them rather as wrecks to be avoided, than as examples to be imitated.

In the opening pages of his letter, Mr. Fisher is confronted by the question—what is meant by the terms “Code” and “Digest?” We ourselves have often been met by the same difficulty, and could verily wish that the respective

terms were defined by Act of Parliament, or in some other authoritative manner, for by no other means can we venture to hope for the removal of the ambiguity which now besets them. Mr. Fisher is too cautious—perhaps too wise—to attempt a *definition* of the terms. He gives, however, an explanation of the sense in which he himself uses them; and this explanation is worth attention, inasmuch as it shows that the Digest which Mr. Fisher contemplates is something very different from that which many persons understand to be meant by the term. Mr. Fisher first adverts to the ordinary conception of a Digest and a Code as “bodies of law which depend respectively upon external and internal authority.” This idea he notices only in order to repudiate it. A Digest, in his conception of the term, is none the less a Digest because it is authoritative. Indeed, he afterwards proposes that the future Digest of the English law shall itself receive a legislative sanction. He next proceeds to repudiate the idea that a Code is any the less a Code because it is drawn from previously existing law. “A Code, like a Digest,” says Mr. Fisher, p. 4, “is a condensed body of law; and if, like a Digest, it be also a condensed summary of existing law, it is not the less a Code, although, as in the case of Justinian’s Code, it may be supported by references, and illustrated by citations.” The true distinction between the terms lies in their respective origin. “Although the word Code may properly be applied to any body of condensed law, the use of the word Digest is more limited. A Code may be the mere creation of its framer, or may be made by collecting, arranging, and condensing laws which already existed; but a Digest—that is, a pure and simple Digest—can be made in the latter way only.”

The Code contemplated by Mr. Justice Willes is presumed to be “a Code which shall be not merely a concise summary of the English law as it exists” (this would be a Digest), “but which, being purged from all conflicts and inaccuracies,

including the conflicts of Law and Equity, and enriched with such improvements from foreign laws and other sources as the wisdom and experience of its framers may devise, shall form a body of law thoroughly adapted to the habits and transactions of the English people, and as perfect as skill and learning can make it." Mr. Fisher, like Mr. Justice Willes, looks forward to the construction of such a Code as the ultimate end to be reached, but he desires, as we have already seen, to proceed by steps, and to complete a Digest before directly commencing a Code.

Mr. Fisher proceeds to contend that the contemplated Digest should not be confined to a statement of the principal propositions of law, but should also contain the minor rules by which those propositions are explained; in fact, that it should constitute a complete exposition of the *whole* of the existing law. In this recommendation we entirely concur. Anything short of this would be a skeleton, useless to the practitioner, and calculated rather to mislead than to guide the layman. Mr. Fisher is most anxious to combat the objection that a Digest composed upon these principles would necessarily swell to an unwieldy size. He entreats us to remember that compression, if carried beyond its due limits, will deprive the work of all practical value; and labours, by a variety of calculations, to show that the size of such a work would certainly not exceed twelve octavo volumes, and might probably be comprised within nine or ten. We see no reason to question the correctness of the calculation; but why this extreme anxiety about smallness of size? By all means let us reject everything which is redundant or superfluous. But when these are omitted, why labour for the reduction of the residue? A Digest is designed to be a complete exposition and representation of the law. If it is less than this, it falls short of the first end of its existence. If then the existing law does not admit of complete exposition and representation, except at considerable length, it may be a misfortune, but it is one to which we must submit, as

we do to a long drought. To secure brevity at the expense of utility would be an act of madness. "Brevity is of no importance, except as it tends to perspicuity and accessibility," says Mr. Austin (Vol. III., p. 292), and we commend his words to the attention of those legal reformers with whom Mr. Fisher contends, and who seem to think that the first of all qualifications in a Code is, that it should be short. They might as well say, that the first of all qualifications in a map is, that it should be small.

Finally, Mr. Fisher considers the question of the authentication of the Digest when completed. Upon this point he proposes that the sanction of the Legislature should be conferred upon the Digest, and that it should become substantive law.

This is Mr. Fisher's plan. Mr. Justice Willes, on the other hand, wishes to draw up a Code at once, omitting any intermediate stage. This course would save some trouble, and (possibly) some time. It is the bolder, but at the same time the more hazardous, step. We may point out one objection to immediate codification, which is not mentioned by Mr. Fisher. According to Mr. Fisher's scheme, the various organic changes in the law, which are contemplated by all, and of which the fusion of Law and Equity is the chief, will be made gradually, and one by one. They will also be kept distinct from the introduction of the (authoritative) Digest, a step which must necessarily constitute in itself a sweeping innovation. According to the plan of Mr. Justice Willes, all these changes, organic as well as formal, will be made simultaneously by the enactment of a Code—they must be swallowed in one huge gulp. It may be doubted whether the Parliamentary gullet is sufficient for the effort. It would be painful to see the Code, when at last complete, lying unheeded for years on the table of the Legislature—a fate which has already befallen the kindred Codes of New York.

But, perhaps, the most interesting portion of Mr. Fisher's

letter is the Appendix. This contains a specimen of the Digest contemplated by Mr. Fisher. We imagine that we are not wrong in supposing that the extract in question is drawn from the completed portion of the specimen Digest, prepared by Mr. Fisher himself under the auspices of the Digest Commission. It possesses, therefore, especial interest as a sample of the work in hand. As such we hail it as of happy augury. It strikes us as a most skilful and masterly production—one of the best pieces of work of the kind that we have seen, whether of home or foreign manufacture.

Our readers will naturally desire to judge for themselves upon this point; and we cannot conclude our remarks better than by extracting the first few sections of the Appendix in question.

Division IV.—Liens.

Nature of Lien.—122. A lien is an obligation which, by implication of law, and not by contract, binds real or personal estate for the discharge of a debt or engagement; but does not pass the property in the subject of the lien.

Contract excludes Lien.—An express contract for a lien excludes such a lien as, but for the contract, might have arisen by force of law, 64.

123. Liens are *possessory or non-possessory*.

Subdivision 1.—Possessory Liens.

Nature of Possessory Lien.—124. Possessory liens bind personal chattels of the debtor by virtue of, and during the possession thereof by the creditor; without which, subject to the qualification in Article 137, they are not valid either at Law or in Equity.

Effect of Lien upon Money.—The possessory lien upon money, as distinguished from the lien upon other personal chattels, is divisible, and only extends to so much of it as equals the amount of the debt due to the holder.

Lien supports Action at Law.—The right of possession, conferred by a possessory lien, is sufficient to support an action at law, founded upon an alleged ownership in the person claiming the lien.

125. The possession will not support the lien.

When Possession will not support Lien.—(1.) If it were obtained without authority, or by fraud, misrepresentation, or other wrongful act, even though the holder of the chattels has made advances on the faith of the owner's promise to consign them to him.

(2.) If it were given casually, and not in the course of business, or for safe custody, or for any other special purpose, or by a mere trustee or person not entitled to the absolute ownership of the chattel.

The lien may arise, if, upon failure of the special purpose, the chattel be allowed to remain in the hands of the deposittee.

(3.) If it be subject to a right of use or control by the owner of the chattel.

This rule excludes from the right of possessory lien:—

The agister of cattle in respect of the price of the agistment;

The stablekeeper in respect of the keep of horses, or of labour or cost bestowed upon them, although at the owner's request;

But not the innkeeper in respect of the like charges, because he is bound to receive the horses—140.

ART. III.—THE ADMINISTRATION OF JUSTICE IN INDIA.—No. II.

IN a former article on this subject * we showed what was the nature of the justice administered in the Subordinate Courts in India. We come now to the District or

* Vol. XXIX., p. 331.

Zillah Courts. These Courts, as we have already pointed out, are practically only Appellate Courts, almost all the original jurisdiction having been made over to the Subordinate Courts. With such Courts as the present Subordinate Courts for the trial of the original suits, no system of Appellate Courts, however learned the judges, or however able the Bar, could effect anything like a pure administration of justice in India. What possible advantage can be derived from an appeal when (to use, not the words of a mere outsider, but the well considered and judicial language of the judges themselves *) judges of these original courts utterly disregard the law, when notes of evidence taken by them are a disgraceful farce, when such a thing as a trial in the proper sense of the word is unknown, and when the record is one chaotic heap, consisting of a mass of matter having no more bearing on the law suit which it purports to be than to an adultery case of the day before?

How chaotic this mass of irrelevant matter is may be understood from the fact that, to prepare an appeal for hearing by the Judicial Committee of the Privy Council, it requires at least four years to allow the clerks and translators and parties time to sift the wheat from the chaff, and translate the papers which bear on the case; and after all, even with this four years' sifting, their lordships constantly complain of "the frequent inclusion of voluminous papers, accounts, and receipts in the transcripts printed in India, and sent over in that form to the Registry of the Privy Council, an evil which appears to be on the increase."

The duty of a Court of Appeal is to correct the mistakes of the court that tries the case, but what is to be done when the whole record in a case of any difficulty contains nothing but mistakes? The plaint does not show distinctly what the plaintiff claims, nor does the answer show what it

* Morley's Digest.

is that the defendant takes objection to, or what it is that he admits, while the issues, which it is the duty of the judge in India to ascertain, are probably directed to points altogether irrelevant, and the evidence is for the most part inadmissible and seldom or never connected with the actual issues.

The whole trial is in fact so bad that there would be only one conclusion in England, in every case, and that would be an order for a fresh trial. But suppose the judges were hearing an appeal in an Indian District Court, would they feel justified in ordering a new trial, "a second representation of the disgraceful farce, a second series of those gambling matches where parties try their strength, and the most wicked and cunning gain the day."

No doubt if the Appellate Courts are not fit to perform the work entrusted to them, the enormous evil caused by the utter rottenness of the original trial would be greatly increased. There can, we think, be little doubt that the Appellate Courts are not so fit as they ought to be. Not only have the Native Judges unlimited original jurisdiction, but they have practically unlimited appellate jurisdiction, and in Bengal they actually try half the whole number of appeals filed. We wish now, however, to refer more particularly to the European Judges of the Appellate Courts. These judges are undoubtedly also very inefficient. In the first place, the principle of granting an appeal from one single judge to another single judge is, we think, erroneous. If the Appellate Judge should differ from the judge who tried the case, it is merely the opinion of one man against the opinion of another, and in regard at least to the points of fact, the judge who tried the case is by far the most likely to give a correct opinion. No judgment of any court should be liable to be reversed unless two judges at least concur in thinking it erroneous. The next point in the constitution of the Appellate Courts which is altogether faulty is, that throughout India the Europeans who are ap-

pointed to preside over them have had no experience in the trial of original suits. In Bombay a young civilian, two years after his arrival in the country, is at once appointed an Assistant Zillah Judge, with jurisdiction to hear appeals from men who have spent their lives in the administration of justice in India. In Bengal it is worse. There civilians who have spent the best part of their service as tax-gatherers are late in life promoted to the judicial office. But the great blot on the present system is, that the two years of probation in England, which a civilian passes before proceeding to India, are, although not absolutely wasted, yet not employed, as advantageously they might be, in preparing him for his duties in India. The *curriculum* wants revising, and, above all, the doctrine that by reading a few law books and attending a few trials, one half of the procedure in which is utterly unintelligible to him, the young civilian can *ipso facto* become a lawyer, must be relegated to the obscurity it deserves. One-third of the probationers at present work honestly for their half-yearly examinations, the other two-thirds cram for a fortnight previous to each examination, and the majority of them succeed in passing muster. Those who do not are fined, but although they cannot satisfy the examiners, they find their way to India in due time in spite of their failures. Occasionally the Civil Service Commissioners display a spasmodic vigilance, and pluck a few unhappy wights, who, relying on the fact that so many before them have crammed their way through their time of probation, attempt to travel by the same royal road. In a word, cram is the curse of the training of the young Castilians.

Notwithstanding, however, the disadvantages under which the European judges labour, they are undoubtedly better judges than the present Native Judges, even from the first day they take their seat on the Bench, ignorant as they may be of the law, and even of the language in use in their Court, inasmuch as they are civilised and educated human beings, whereas there is scarcely one of the Native Judges that has

received any education at all. They have usually a knowledge of the three R's, and smattering of the technical rules of Indian law, but anything like a liberal education or a knowledge of the universal principles of Jurisprudence is not possessed by one in a hundred of the present Native Judges.

A writer in the *Edinburgh Review* has suggested, as a remedy for the admitted evils of the Indian judicial system, that more natives should be appointed to the Bench than at present.* This seems to us not to touch the real root of the disease. There is even strong ground for doubting whether to carry out the recommendation would not be to make the evil worse than it has ever been before. Whether the main cause of the injustice, now administered in the Indian Courts, is that the administrators of that justice are natives or not, one thing is clear that, in the only place where Europeans do the whole, or nearly the whole, of the judicial business, including the work of the Bar and of the officers of the Court, justice is administered by all classes to be better administered than it is where the whole of the Bar, the whole of the officers of the Court, the whole of the Judges of Original Jurisdiction, and half of those of Appellate Jurisdiction are natives. The civil justice administered in presidency towns may be said to be European justice, while Mofussil justice may be said to be Indian justice. We do not say, and, in fact, we do not believe, that it is because Mofussil justice is administered by Native Judges that it is notorious; but we do say that a remedy, which proposes merely to add to the already existing ninety-nine judicial offices held by natives, the one solitary office that has gone astray into the hands of a European is one which can have very little practical results. We do not use these figures in any but their natural sense. That ninety-nine out of every hundred judicial offices are held by natives in the Mofussil is rather an under-estimate than

* Article "Indian Judges—British and Native."

otherwise. One defect of the proposition made by the writer in the *Edinburgh Review* is, that it is limited to improvement of the Bench, and only an infinitesimal portion of that, while it leaves the Bar and the whole of the ministerial officers as before. To us it seems that both in the Native Courts and in the European Courts it is the Bar and the Subordinate officers that most urgently call for reform. The Bench, bad as it is, is not so bad as either of these other, and we would say, equally important, branches of judicial administration.

The question as to what are the best men for Indian judges seems to us a comparatively subordinate one. Some say that English barristers alone should be appointed; others prefer civilians, and others again think natives the best judges that can be procured. Our opinion is that good judges and sound lawyers may be found in each of these classes. It is equally true, however, that each of them contains members whom it would be a disgrace to any government to appoint to a high judicial office. There are briefless barristers, whose sole qualifications consist in having eaten a certain number of dinners. There are many men also practising at the English Bar who, at least under the present judicial system, are no lawyers. They have a one-sided view of the law administered in courts of law, but have no idea of the connection of the partial knowledge they have with general jurisprudence. The judicature and justice administered in the one class of courts is, in the words of Lord Westbury, a *terra incognita* to the practitioners in the other. Men of this stamp would never do for an Indian court. Another objection to barristers is their astonishing ignorance of Indian languages, even after years of residence. In the presidency towns the courts have committed the enormous wrong of forcing a foreign language on all the suitors who come before them; but in the interior the language of the courts is still the language of the country, and it is to be hoped that it will long con-

tinue to be so, at least to such an extent that the parties shall know how their cause is being tried.

As to the covenanted civilians, those men who have spent the greater part of their service in other than judicial work, they are of course utterly unfit to be made judges. This has been admitted on all sides, and for the last fifty years writers of all shades of opinion have been demanding that a reform should be made, by creating a judicial department of the service. The civil servants themselves have been as persistent in their assertions of the necessity of this reform as any other body of men. Public-spirited natives have again and again brought this question into prominent notice, and yet, strange to say, nothing has yet been done.

The qualifications in the civilian, which point him out as most suited for judicial work in India, are, that the legal training which he is supposed to undergo before he leaves England, is one in which the general principles of jurisprudence are made of greater importance than the technical and purely local and arbitrary distinctions of either English or any other law, while attention is also given to the positive provisions of the Hindoo and Mahomedan legal systems. Another point in his favour is, that by coming to the country early, he acquires a more intimate acquaintance with the language and manners of the people than it is possible for any man to reach who has never come to India till late in life. The benefit of knowing the language of the country is, however, under the present *régime* often done away with. Rather than interfere with the sacred rule of promotion by seniority, it is not uncommon for the same judge to preside in the same year over courts as distant from each other, and differing as much in their language as if, to take a European example, a French judge were transferred, say for two months to Liverpool, four to Berlin, and six to St. Petersburg or Madrid. Most civilians know tolerably well two or three Indian languages, but it is hardly possible for any one man to know all these languages as intimately

as is absolutely necessary for the administration of justice in India. To do this, the judge should know the language as thoroughly as he knows his own, and this can only be done by confining the judge to one country and one language during his service. From the circumstance that the European judges are only Judges of Appeal, it is impossible to compare their work with that of other courts, either in India or elsewhere.

In Bombay there is a judicial branch of the service which is kept for the most part distinct from the revenue. These, too, in a very limited number of cases, the District Judges have original jurisdiction. These cases are actions against the Government and its officers acting in their official capacity. The questions that arise in these suits are well known to be the most important, difficult, and complicated, that ever come before courts of justice, involving, as they do, the respective rights and liabilities of the subject and the sovereign power.

A reference to the reports shows that in India they are certainly not less difficult than petitions of right are in England. The last Administration Report of the Bombay Presidency gives a return of these cases. We find from it that out of 393 appealable judgments passed by Assistant Zillah Judges, five were reversed, four modified, and five remanded for re-trial; altogether only 2·29 per cent. of these decisions were altered. We believe that this will compare favourably not only with Indian cases in other Mofussil Courts, but even with the decisions of barrister judges in the High Courts, who have about five times the salary of an Assistant Judge. From the same report we find that out of 469 appealable judgments passed by these barrister judges, twenty-five appeals were made. How many of these appeals were successful in whole or in part is not stated, but unless the parties were very badly advised, it is to be presumed that nearly one-half would succeed. This would give about 2½ per cent., and as the majority of the High Court cases are mere money claims for goods sold, or on promissory notes and such simple matters, such cases, in

fact, as are likely to arise in a City Court, the result does not show any very marked superiority on the part of the High Court Judges, especially when it is considered that the Assistant Judges are young men, and new to their work, and have neither the assistance of a Bar nor of competent officers.

If we compare this with work of exactly the same description performed by Native Judges, the result is equally favourable. The only return of such cases which we have been able to procure is that of the Remembrancer of Legal Affairs to the Bengal Government, containing a Report for two years, 1866-67 and 1867-68. In the first year the number of cases was 305, out of which 28, or 9·1 per cent., were reversed on appeal. In the second year there were 435 cases, out of which no less than 77, or 17·7 per cent., were reversed. This does not include the cases remanded for re-trial. The whole of these trials are not by Native Judges, but it is believed that the great majority were tried by them, as they alone have jurisdiction to receive the case originally, and it is only when a special order is made to transfer the suit that a European judge can try it. These facts seem to bear out the opinion expressed by one of the most learned barrister judges who ever came to India, and who was not likely to have a prejudice in favour of civilian judges. We refer to Sir Joseph Arnould, one of the Judges of the High Court of Bombay. The following was what was said by him in reply to the toast of the Bench and the Bar, at the dinner given by the Byculla Club to Sir Bartle Frere, on the occasion of his retiring from the Governorship of Bombay. The toast of the Bench and the Bar had, till then, uniformly been treated in India as applicable only to the judges and barristers in the City Courts of Calcutta, Madras, or Bombay. The existence of any other Bench or any other Bar in India was invariably ignored, both in proposing and replying to the toast. There was, therefore, nothing in the nature of the toast which, in

the ordinary course of things, called for such a eulogy as Sir Joseph went out of his way to make

"I am," he said, "one of those who think that the amalgamation of the Courts has been a great and a decided success. It has in every way been beneficial. It has done much towards the extinction of old class prejudices, and has decidedly tended to improve the administration of justice in the Mofussil. The barrister judge who sits on the appellate side of the High Court learns to respect the legal acquirements of his learned civilian colleagues; to the young civilians themselves the position of a High Court Judge presents greater attraction than the position of a Sudder Judge did formerly. The feeling of the service itself, with regard to the judicial office and functions, has lately undergone a considerable change for the better. The old implicit belief of the Civil Service—the rooted conviction that *ex quo vis ligno fit judex*—if not altogether abandoned (it would be too sanguine, perhaps, to expect this) has, at all events, been very considerably mitigated. Some of the ablest members of the Service have cultivated with successful zeal the science of jurisprudence, some of the more promising among the young civilians have given fuller intimation that, as far as the exigencies of the service admit, they desire to be regarded as candidates, rather for its judicial than for its administrative branch. Under these circumstances, it is to be hoped we have almost heard the last of the old-class cry, of trained against untrained judges, which was once so much too common. I never could in any way join in that cry; it always seemed to me so ungenerous and unjust. What, in fact, could be more unfair than a comparison between the barrister judges of the presidency towns, with all the appliances that a centralised administration of justice placed at their command, and the civilian judges of the Mofussil, left to grope their way through masses of native documents and labyrinths of native testimony, without the aid of skilled interpreters and translators, above all, without the inestimable advantage of a trained Bar, a body of men too honourable to misstate or mislead, too learned not to throw all the light that can be devised from established principles and recorded decisions on the point submitted for judicial determination, and now I want His Excellency (Sir Bartle Frere) to

take with him across the *Kala panee* a sentiment which I will pack up into small compass for convenient exportation, and it is this—*No class of young men can be imported from England better fitted for the successful administration of justice in the Mofussil than the class of civilians who are now coming out to us ; young men well grounded in general principles of jurisprudence, completely versed in the vernaculars, ready, so far as the exigencies of the service will permit, to devote themselves exclusively to a judicial career.* I want His Excellency to carry that opinion home with him to be slung, as occasion may serve, against that redoubtable Goliath of the trained barrister interest, my honourable and learned predecessor, Sir Erskine Parry. With this great change for the better in the feelings of the civilians towards the judicial branch of the service, with the prospect that before three years are over our presidency Bar will be reinforced, by the admission into its ranks of the picked men among the law graduates of the University with, what I hope may soon be realized, the permanent promotion of a Native Judge to the Bench of the High Court, I feel confident that the Bench and the Bar in India will not, in the future, be less deserving than you are pleased to think them now."

The writer of the article in the *Edinburgh Review* is said by the Indian papers to be a barrister judge of the Calcutta High Court.* Whether the writer is a barrister judge or not, he is evidently one of those who think that no man can well be a lawyer unless he has been a barrister. It is necessary that such men should be reminded that England stands almost alone of all countries in the world in respect of recruiting its Bench from the Bar. The judges over the greater part of the continent of Europe have never practised at the Bar, and many of them hold as high positions in the opinion of the world as juriconsults as any judge that ever sat on the Bench. At any rate it cannot be said of them as was said only the other day

* The mistakes contained in the article are just such mistakes as a barrister judge who had never been in the Mofussil was likely to make. "By far the largest proportion of judges in India are," he says, "covenanted civilians." The real truth being that there are nine Native Judges to one Civilian Judge. He has also mistaken the jurisdiction of a District Judge.

in Parliament by Lord Westbury of the judges of England, "that the judicature and justice in one class of courts was a *terra incognita* to the practitioners in the other, and that the same was the case in respect to the judges."

As to the qualifications of natives for the Bench, what we have stated in the foregoing portions of this article may appear to favour the opinion that they are not suitable. We wish it to be distinctly understood that such is not our opinion. What we have been hitherto speaking of was a certain class of natives who till now have held a monopoly of judicial appointments. That class consisted for the most part of men who had risen gradually through the various offices of the courts, from copyist up to a judge's clerk. In one case where an inquiry seems to have been made, it appeared that of six judges in the district five had previously been clerks in the District Court and four were Sheristedars (judge's clerks) at the time of their appointments.* But whether the judges were formerly mere clerks or not, until very recently no education whatever was required. In fact the salary was so small that Government had to appoint not the best men, but any men they could get. It is impossible to doubt that the natives of India are not only fit for judicial work, but that they have a remarkable aptitude for the discussion and solution of doubtful points of law. Many native members of the Bar practising in the various High Courts would take a high place anywhere for thorough acquaintance with the principles of jurisprudence, for sound learning, and high attainments of every description. The command which many of them have attained over the English language is truly wonderful. They are in the daily habit of addressing the Court hour after hour in a language which to them is foreign, but which they speak with perfect diction, and entire freedom from solecism. So complete and precise is the knowledge of the language, and so perfect is the accent of many a High Court pleader,

* Bombay Circular. Order No. 2193 of 1843.

that but for the colour of his face and the dress he wears, it would be impossible to say that it was not an English barrister who was addressing the Court.

Such men would make as good judges as could possibly be got for the District Courts, but in order to get them they must be offered an adequate salary. But any plan which threatens the public purse will be certain to be negatived. It is as well, however, to point out that in this case the object can be attained, not only without taking any of the public money, but actually leaving to the Treasury the profit which it is at present short-sighted enough to make out of the courts of justice. What we would recommend is, to give to the District Courts their proper work, namely, that of the Superior Courts of Law in England, of the Session Court in Scotland, of the High Courts in presidency towns, and of the Courts of First Instance all over the continent, and in the foreign possessions of continental powers. What is wanted is, in short, to give India a system of courts having some resemblance to that of every other country in the world which is blessed with a civilised government.

A court composed of covenanted civilians, natives of India, and English barristers, would be in our opinion the most suitable of all. The want of energy and system which is the main weakness of a Native Judge would be amply made up for by his brother judges, while the mutual influence of the barrister and the civilian on each other would not be without its advantages. The constitution of a District Court would thus be the same as the constitution of the High Courts. Instead, however, of having at least one-third barristers and one-third civilians, the proviso should be that there should be at least one-third natives and one-third civilians. The necessity for a knowledge of the language and the present constitution of the District Courts, renders some such distinction necessary. It would be impossible to substitute an entirely new body of judges for the judges already appointed, and even if it were possible, the expense

would be so great, that no government could attempt it. The only plan is to distribute the work in a rational manner among the present courts, and gradually, as vacancies occurred, to introduce barristers and High Court vakeels, until the court contained as many of each as might be thought advisable. No immediate improvement would take place in the judges beyond this, that the best of the present Native and European Judges would try the heavy causes instead of the worst. But although no great change in the judges would take place, there would be an immediate improvement in the Bar, which would have a much greater effect than any improvement of the Bench. The concentration of heavy and important cases into one court in each district would at once bring members of the over-stocked Bars of the presidency towns, and even of the English Bar, to practice permanently in the Mofussil.

The present European District Judges of the Appellate Courts with the best of the Native Judges might be made the first judges of the new High Court of Justice, leaving the less capable judges of the Subordinate Courts to their proper functions of trying Small Cause Court cases. Mr. Maine, who has done more for India than, perhaps, any other man in the way of scientific legislation, carried through the Legislative Council, in 1865, an Act for the establishment of Small Cause Courts, and wherever they have been erected they have been received by all classes of the community as the greatest boon that could be conferred upon them. All that is wanted is to extend this Act over all India, as the County Courts are spread all over England. It might be dangerous at first to allow all of the Native Judges to hear Small Cause cases without appeal, although to do so would be a much less evil than to allow them their present jurisdiction, even with as many appeals as can possibly be given. It is not, however, a necessary part of the Small Cause system that there should be no appeal. A Small Cause Court Judge could try just as many cases, or with only a very

slight diminution, with an appeal as he could without one. The procedure is the same in both cases, being that laid down by the Civil Procedure Code for all courts in India. The reason which the County Court Judges in England give for the small number of appeals is the desire of the suitors who usually come before their Courts to settle their affairs out of hand. It was probably intended by Mr. Maine, when he framed the Act, that these Courts, like the County Courts in England, should be universal all over India. As yet, however, they have only been partially introduced, and the result is very curious. A suitor who has a claim for say 5s. as the price of some petty article sold, goes before a Small Cause Court Judge on a salary of 1000 to 1500 Rs. a month, while if he has a claim for land worth a million of money he must go before a judge on 500 Rs. The Superior Court suits go to the ill-paid judge and the petty debt cases to the Superior Judge.

This has arisen to a certain extent from a belief that it is only in large cities and populous places where a sufficient amount of work can be obtained for a Small Cause Court. These Courts have been as yet created in such places only. The principle followed in England has not yet been carried out in India, of giving one judge to a large number of courts in poor and sparsely-populated districts. By giving a Small Cause Court Judge jurisdiction in three or four of the present Subordinate Courts, sufficient work could always be found for him in any district. In England a County Court Judge presides over as many as twelve courts, whereas in India he seldom presides over more than one. In Bengal, for instance, there are twenty-six judges to thirty-six courts, and in Bombay there are four judges to five courts.

Another reason for granting to such inferior courts as we have described the enormous jurisdiction which they possess, seems to be a belief that however erroneous might be the conclusions to which these courts might come, a certain remedy was provided by allowing a sufficient number of appeals.

However bad the court, however ridiculously underpaid, and ludicrously incompetent the judge, only let there be three or four appeals and all will be well. A theory more unfounded or more mischievous than this it is impossible to conceive.

The number of appeals in India is enormous, and the number of decisions reversed is truly appalling. Out of 703,000* complaints filed in the year throughout the whole of India, the great majority of which (more than 80 per cent.) are Small Cause Court cases, and of which a vast number (more than half) are never contested at all, there are no less than 68,607† appeals, and about 100 appellate tribunals constantly sitting, and several hundred tribunals partly employed in hearing those appeals.

In fact it may be said that in India every contested case of any consequence is appealed, and the only result of making the existing Appellate Courts High Courts of Original Jurisdiction would be that the cases they now hear in appeal would be heard as original suits. The greatest condemnation of the system is that it is altogether an innovation in the native judicial procedure. So new is the idea of an appeal to the native mind, that they have had to borrow the word "appeal" from us to express it. There is, we believe, no word for appeal in any single language in India. An appeal from a corrupt or utterly incompetent court seems to us about as absolutely useless a proceeding as can well be imagined. The opinion of Mr. Best on the value of an appeal is worth quoting:—

"An appeal," he says, "to a superior tribunal on mere facts or combinations of law and fact is, when considered in se, of all checks the most illusory, and of all encouragements to vexatious litigation

* This is the estimate given in the debate in the Court Fees Bill, but there seems to be some cases left out of the calculation.

† The numbers are:—in Bengal, 24,278; Punjab, 14,938; Madras, 9047; North West Provinces, 9042; Bombay, 4389; Burmah, 1647; Central Provinces, 1619; Oude, 1484; Mysore, 1059; Berar, 861.

the greatest. Through the mass of allegation, argument, and evidence it is sometimes almost impossible to ascertain on what ground the decision of the court below proceeded: a disbelief of the witnesses, a misunderstanding of their testimony, or an erroneous view of the law, and the judge whose decision is appealed from may fairly ask that the superior tribunal shall have before it all the materials on which his decision was founded. But this is from the nature of things impossible; who is to report the *demeanour* of the witnesses when giving their testimony, and the evidence itself may be so voluminous as, in the case of a poor litigant, to amount to a prohibition of appeal. Moreover, when the decision of the superior tribunal is obtained, it carries little or no moral weight with it, for it is only the opinion of Judge A against that of Judge B on the credit due to witnesses, or the inference to be drawn from certain facts, in which after all Judge B, whose decision is reversed, may be right."

As to the Courts of Second Appeal. This work is done in Bengal, Madras, Bombay, and the North-West Provinces by the High Courts there established, and against these there is not one word to be said, except perhaps that the civilian judges would probably be better lawyers if they had not devoted a large portion of the early years of their service to purely administrative work. Even as they are, however, the public have entire confidence in these Courts, and their decrees are always looked upon with respect, and deservedly so. The state of affairs, however, in other parts of India is different. In the Punjab, the chief court is constituted on the same principle as the High Courts, and gives, we believe, equal satisfaction; but in Oude, in the Central Provinces, in Scinde, in Burmah, in Berar, in Coorg, and in Mysore, the Court of Ultimate Appeal in India is composed of one single judge, and that judge is, in some cases, a military officer, who may never have opened a law book in his life. In Burmah the state of affairs seems to be about as bad as it is possible for them to be. The Ultimate Court of Appeal there is presided over by Colonel Fychte, who, we trust will forgive us for saying, does not appear to be much of a

lawyer.* It is unreasonable, indeed, to expect that he should distinguish himself in that capacity; as unreasonable as it would be to expect a lawyer, who had never been in uniform, to command a regiment with success. He has himself protested against the anomaly, and it is, therefore, upon the Government of India that the whole responsibility of the system must rest.

"It cannot be doubted," he says in his last Report, "that one of the great wants of British Burmah is a judicial commissioner; the duties performed by this officer in the two other administrations in Oudh and the Central Provinces, are here performed by the Chief Commissioner, who, in his executive capacity, has as much to supervise, and as many responsibilities, as would suffice for one individual; in addition to which, he cannot but think that to erect the chief executive officer in a province into Chief Judge is making him, in many cases, judge in his own cause, having to determine many points which intimately affect the revenue, and the well-being of the Government for which he is responsible. The double duty, in most countries considered incompatible, of having to administer a country,† and of being the sole presiding judge in the Ultimate Court of Appeal, is one which entails so much responsibility, so much anxiety, and such an extreme amount of labour, that nowhere, except in British Burmah, is it imposed upon any officer."

It seems to us scarcely credible that a government of English gentlemen should so completely neglect their duty as to set up a sham, such as this, for the Supreme Court of Ultimate Appeal in a country as extensive as their own native land. This system is what is called the non-regulation system, not that there are no laws in force in the territory to which the term applies, for there are more regulations in the non-

* There are no reports given of the cases decided in his Court; we speak from certain legal opinions expressed by him in his Annual Report, in regard to the law in force in British Burmah and other matters.

† British Burmah is larger than all England, Scotland, and Wales together.

regulation provinces than in any of the other parts of India. The system is said to be necessary to accustom the people to our institutions in countries recently annexed. In other words, to teach to the people of a newly-acquired State the systems we have established for the attainment of fair dealing and justice, it is considered best to send to them one who knows nothing about these systems whatever, and in case that even he should give the natives too large a dose of justice, to take care that he shall only have occasional spare half hours to devote to the work.

There is no means of knowing how disputes are settled in these non-regulation provinces as there are no reports, but the author of "Rural Bengal" has given us a picture of one of them, which it is difficult to read without one's blood boiling with indignation. A brave, truthful, simple, and primitive people were driven into rebellion from sheer misunderstanding, neglect, and misgovernment, or rather want of government.

"Year after year the Santal sweated for his oppressor. If the victim threatened to run off into the jungle the usurer instituted a suit in the courts, *taking care that the Santal should know nothing about it till the decree had been obtained, and execution taken out.* Without the slightest warning the poor husbandman's buffaloes, cows, and little homestead were sold, not omitting the brazen household vessels which formed the sole heir-looms of the family. Even the cheap iron ornaments, the out-door tokens of female respectability among the Santals, were torn from the wife's wrists. *Redress was out of the question.* The court sat in the civil station perhaps a hundred miles off. *The English judge, engrossed with the collection of the revenue, had no time for the petty grievances of his people.* The native underlings, one and all, had taken the pay of the oppressor. The police shared in the spoil. 'God is great; but He is too far off,' said the Santal, and the poor cried, and there was none to help them."

We have now gone over the principal classes of courts

in India, and we have endeavoured to bring home to our readers the true character of our so-called dministration of justice in India. There are many points which we have not gone into. The immense cost of justice in India, and the long and wearisome delay, the hope deferred that maketh the heart sick. Cases which have been before the courts, not two, or three, or four, or five years, but twenty, and thirty, and forty years, and even fifty years.* The delay in the courts of India is, and has always been, worse than that of the Court of Chancery in its worst days. In Chancery a decision was worth something when it was obtained, but in India after half a century it may be spent in litigation, and a decision having been finally arrived at, the suitor's troubles only just begin. The following recent case† which we cannot resist quoting, will beat *Jarndyce v. Jarndyce* hollow, and no Chancery suit that was ever filed will compare with it. The following is an extract from the judgment of the Privy Council in the case:—

“Their Lordships, in a judgment necessarily so long, have thought it right to take no notice of several matters, important in themselves, but not affecting their decision; they have now disposed of the various points relevant to that decision, and which were urged by the learned counsel for the appellant with their usual zeal and ability; but they cannot pass from this case without the expression of their surprise, and deep regret, that such a case should have been possible under the system of jurisprudence prevailing in any country under the British dominion.

“ — pudet hæc opprobria nobis,
Et dici potuisse et non potuisse refelli.”

“The subject-matter of the original suit, a debt, it should seem undisputed, or at least as to which, in substance, no serious dispute was possible, where the plaintiff's difficulty had not been to establish his right to the judgment of the Court in which he sued, but to

* See Privy Council Reports, Indian Appeals.

† *Rajah Mohes Narain Sing v. Kishramund, Miner, and Another.*

make that judgment available when obtained, though the funds were ample for the purpose. By fraud and chicanery, by every possible abuse of the forms and procedure of law, by force and violence, even, it is to be greatly feared, to the shedding of blood, justice was evaded and defied for fifteen years, from 1830, when the decree was pronounced, to 1845, when the final sale took place. The original plaintiff, wearied out with the long delay and expense, fain to sell the benefit of his decrees, the unhappy man who had been substituted for him losing his life, while vainly striving to realise its fruits. And now, in 1862, their Lordships have been called on to dispose of a suit, in which it is sought to invalidate that whole proceeding as against a purchaser for value, the second in succession from the execution creditor, against whom, or the party from whom he immediately purchased, no fraud, no collusion, no knowledge of the supposed defects in the title is alleged. They have had to deal with a record of nearly three hundred pages in folio, setting out more than three hundred documents and depositions. Their Lordships do not intend hastily to cast censure on any individual; the materials are not before them for that purpose, nor is it within their province to do so; but it is useful to point out that a system under which all this is possible loudly called for amendment, and, administered as it here has been, defeated the very object for which it was instituted."

We fervently hope that the evidence we have collected in these articles will attract more attention to the reform of the judicial system of India. It will be a great and a glorious day for India when its rulers shall give it a High Court of Justice, presided over by judges of ability, learning, and unquestionable integrity, with an honourable and independent Bar, and officers of tried probity and capacity.

The supersession of the present pests and plague spots on the face of the land by Courts of Justice such as these—by Courts of Justice in the true sense of the words—is one of the first duties of England to her dependent eastern subjects, and the longer that this is delayed, the heavier will be the reckoning which must be made with the millions committed to our care.

We cannot do better than conclude with the almost prophetic words of the great pioneer of law reform in England, when addressing the House of Commons on the subject of the reform of the courts of law. In that speech, thirty years before the outbreak of the Indian Mutiny, and speaking of the very subject about which these articles have been written, the subject of the administration of justice in India, Lord Brougham said :—

“Should the day ever come when disaffection may appeal to seventy millions against a few thousand strangers who have planted themselves upon the ruins of their ancient dynasties, you will find how much safer it is to have won their hearts, and universally cemented their attachment by a common interest in your system, than to rely upon a hundred thousand Sepoys’ swords of excellent temper, but in doubtful hands.”

ART. IV.—THE BIBLE AND THE PUBLIC SCHOOLS.

Case of the Cincinnati Board of Education. London : Cazenove, Old Bailey. 1870.

ENGLAND and America have alike had their “religious difficulty.” In England the question requiring solution has given rise to abundance of discussion, and to not a little ill-feeling. It has threatened to break up the Liberal party. It has drawn from some of the leading dissenting members of Parliament an expression of opinion that they have not been fairly treated. Mr. Miall spoke of being “once bit, twice shy.” Others used equally strong language. The Government has been accused of carrying a measure, by the help of its opponents, against its supporters. In the

third reading in the Commons, Mr. Gladstone had to defend himself, not against those members who sit on the left of the Speaker, but against his own strongest supporters, and yet the whole *fons et origo mali* is that religious difficulty which some of the ablest teachers and school inspectors in England, with men like Dr. Temple and Canon Norris at their head, have declared not to exist. Various solutions have been offered to Parliament. One party proposed a purely denominational system. Another advocated secular schools, while the forms of compromise between these extremes were legion. The system finally adopted is one, as our readers know, which in the newly established schools prohibits all sectarian teaching whatever. No catechism, creed or formula is to be used. *Punch* gave a tolerably fair description of it when he described the contending fractions as having been reduced to the lowest common denomination. It is not a little singular that the State school thus established will correspond very closely to the common school of the United States. There, too, the people were as determined as here to have religious teaching. Secular schools were denounced as godless schools, and no State has yet gone to the length of establishing them. There, too, a lowest common denomination had to be found. It was found very much as the English was. The Bible was read daily, but without note or comment, and there also no catechism, creed or formula was to be used.

But while we in England have just arrived at the solution which America adopted more than half a century ago, a great movement has sprung up across the Atlantic, with the object either of establishing a denominational system of education, or of having one which should be altogether secular. New Englanders, like the Rev. Ward Beecher, are advocating a purely secular system rather than one which shall be denominational; while the Roman Catholics, there as here, are doing their utmost to get the education

of the children of their own communion entirely in their own hands. Openly and avowedly they refuse to sanction the American school system. They say in America what Cardinal Cullen says in Ireland, that Catholic children shall not be educated with Protestant children; that the schools of the country ought to be divided into two great classes, Protestant and Catholic; and that the children in each should be under the supervision and control of its respective religious authority.

The question, therefore, among Americans is, how are these objectors to be met? Two proposals for this purpose have been made. One is, that the schools should be made altogether secular. Exclude the reading of the Bible and religious instruction altogether, and forbid the beginning of the day's work with the singing of a hymn. This is the solution which the School Board of Cincinnati tried. On November 15th last year, a majority of the members passed two resolutions; that religious instruction and the reading of religious books, including the Holy Bible, should be prohibited in the common schools; and that the opening exercises should no longer commence with the reading a portion of the Bible and appropriate singing by the pupils. These resolutions were equally unsatisfactory to the supporters of the present system and to the Roman Catholics. If, says the *American Tablet*, these changes have been brought about with the view of reconciling Catholics to the common school system, their purpose will not be realised. Godless schools are more objectionable to them than sectarian schools. The reading of King James's Bible, much as they objected to it, was yet better than the exclusion of all religious teaching. American Protestantism of the orthodox stamp, says the writer, is less objectionable than German infidelity. Nothing can reconcile them to the common schools in any shape. They are now sectarian. If altered as proposed, they will be godless. They were founded in the main, in imitation "of the system decreed by the convention, that there was no God; which

sentenced Louis XVI. to the guillotine, abolished Christianity and declared death an eternal sleep."

The other proposal and the one which, for the present, meets with most favour, is *stare super antiquas vias*. This common school system has made New England the best educated country in the world—has been copied in many States with great success—has been the admiration of every foreigner—has taken the English, Irish, Scotch, German, and other children whom the tide of emigration has drifted to Western shores, and has converted them into mostly honest, God-fearing American citizens—and, lastly, has worked well wherever there has been a disposition to allow it to work. As the counsel for the plaintiffs in this action says, *nolumus mutare leges nostras*.

Immediately after the resolutions given above had been carried, a petition was filed against the Board of Education of Cincinnati in the Superior Court of that city. The petitioners set forth that the reading of the Bible has been the daily practice since 1829, that religious instruction in elemental truths has been given since the same date, but that no sectarian teaching, nor any interference with the rights of conscience, has at any time been permitted; that no pupil had ever been required to read the Testament or Bible if his parent had desired such pupil to be excused. They maintain that it is impossible altogether to exclude religious teaching, that there are no text-books in existence which do this, and that large numbers of children in the city obtain no religious instruction except such as is gained in the common schools, and they pray that the Board of Education may be compelled to rescind their resolutions.

In answer to this petition a temporary "restraining order" was granted, ordering that the resolutions should not be acted on until the hearing of the petition.

The Board of Education in reply admitted the facts. Their arguments are undoubtedly very forcible. People in Cincinnati are very much divided in opinion on the subject of

religion. The Israelites reject the Christian religion altogether, and admit only the Old Testament to be inspired. Many of the citizens reject the Bible as an inspired book. The Roman Catholic citizens believe that the version of the Bible which is read is incorrect as a translation, and incomplete, inasmuch as it omits books which their Church believes to be an integral portion of the inspired canon. It holds that the Scriptures ought not to be read indiscriminately, since the Church has divine authority as the only infallible teacher and interpreter of them. It maintains that the reading of the Scriptures, without note or comment, and without being properly expounded by the only authorised teachers, is not only not beneficial to the children, but is likely to lead to the adoption of dangerous errors. The practice of reading King James's Bible, say the Board, has had the effect, therefore, of keeping Roman Catholic children out of the common schools. And yet Israelites, unbelievers, and Roman Catholics have all to pay taxes for the support of these common schools. In other words the common school system has found the lowest common denomination by throwing these fractions of the community out of the calculation.

On November 30th last the case came on for argument before the Court. In the volume, whose name precedes this notice, the arguments of counsel are set forth at full. They occupy upwards of 400 pages, and to those who take an interest in this subject they will be pleasant reading. To the present writer they are peculiarly suggestive as indicating a phase in a struggle which is beginning in America, and which, he believes, we shall have to pass through here. The difficulty which met the Cincinnati Board is exactly that which will meet Parliament when it takes into hand the question of Irish education. In England the Catholics are so few that we may find a common denomination without regarding them. But it is otherwise in Ireland. There, the system just established for our English school boards, of a religious teaching, without creed or formula, will be utterly repudiated. An American

system of Bible reading, without note or comment, might indeed be tolerated under necessity, but the teaching of religious truth by a Protestant layman is intolerable. Under the system established in Ireland, by the labours of Archbishops Whateley and Murray, a solution was found which it might have been thought would have satisfied the Catholics. If the majority in the school was Roman Catholic the teacher was chosen from that communion. In any case he only gave religious instruction to the children of his own communion. At the same time the school was open at stated hours to any priest or minister of religion to give instruction to the children of his own sect. If ever a system promised to give satisfaction, surely it was this. Its lines were traced by a joint committee of Catholics and Protestants. The archbishops who presided over the two Churches did their utmost to support it. For twenty years it worked well. It turned out better scholars at the age of fourteen than the English schools. It has never had a charge of proselytism brought home to it. It was managed by a board on which all religious denominations were represented. It was an economical system. It allowed the fullest liberty to the religious zeal of priest and parson. And, lastly, it has formed the model on which several of our colonies have framed systems, which are doing their work admirably.

Yet this system, catholic in the best sense, statesmanlike in its every line, has, since the death of Archbishop Murray, and the accession of Cardinal Cullen, been unsparingly attacked. The Irish priests, with their archbishop at their head, give few reasons for their opposition, but take their stand upon their assertion that it is necessary in the interests of the children that they should be educated in denominational schools. In Ireland as in America they say, make what concessions you like in your common schools, and our children shall not attend. Denominational schools we want and will have. No other schools can give us what we require. We will combine in this matter with no other religious body

whatever. We care nothing for education unless it is given under the clergy. It seems to us important to recognise that this is what the Roman Catholics are claiming both here and in America. The fact ought fairly to be looked in the face. While we are disputing here what we shall do for their relief, while in America the boards are passing resolutions like the one under consideration, the believers in an infallible head of their Church are telling us plainly that no concession will be of avail; that they will not fall into any national system of education, whether it concerns the primary schools or the universities.

Of course we shall shortly have to meet the question, and to decide whether we will allow a multiplication of denominational schools, and, as it appears to us, place in the hands of the priests greater power than they have ever yet possessed over the education of the young; or whether we shall determine to maintain the present Irish system, or establish one which shall be altogether secular. The question, so far as Ireland is concerned, will be upon us before the Americans have to decide it; though it may well be that a longer time may elapse before we have to face it as an English question. We shall then have the experiences of Ireland and of the United States to guide us. We shall find that practically there are only two courses open to us; that the recent solution of the religious difficulty, however satisfactory it may be for a time, is not final; and that the lowest denomination is not common.

The volume before us contains the arguments in full of the Cincinnati case. The plaintiffs endeavour to show, and as the Court decided, successfully, that religious instruction is in contemplation of law an essential element in the common school system of education; that the Board had not power to prohibit such religious instruction. It was clearly shown that the State contemplated religious teaching, but took precautions only that such teaching should not be sectarian; that, in the opinion of men like Judge Story, the constitution

contemplated the protection of religious opinions and worship, prohibiting only an establishment of religion. The plaintiffs proved, too, from the statements of American Catholics, that the latter did not wish to exclude religious teaching, but wished to have such teaching in their own hands. As for the infidel, he could withdraw his child from religious teaching, but he had no right to forbid the State to teach religion. The argument founded on differences of belief fell to the ground. It had been insisted that the elementary truths of religion could not be taught without running into sectarianism, but these truths were common to all sects professing Christianity, and Christianity was recognised by the American constitution.

The arguments for the Board of Education are equally obvious. The strongest, perhaps, is that which has regard to the teachers. These men and women, by whom, or under whose direction, the Bible is to be read, are not abstract, undenominational Christians. They may be Lutherans, Presbyterians, Anglicans, Methodists, Calvinists, Unitarians, &c. Each one has his religious bias; each one will find it difficult to divest himself of this bias when he comes to read the Bible. The reading of the Bible, even if it is to be without note or comment, is really only a sectarian exercise. It cannot be regarded as promoting religious culture. The child either gets some religious notions from it or it does not. If it does, then religious teaching is given conformably to the views of the reader. If it does not, then its only office is to serve as a badge of a particular faith—as the symbol of Protestantism, or as a Protestant minister referred to by the counsel had expressed it, “as the flag of Protestantism on our schoolhouses.” It was easy to say that the Bible ought not to be offensive to Roman Catholics. But reverse the case; suppose the Protestants in a minority. Among the Catholics, as among all Christians to the time of the Reformation, the practice of making the sign of the cross before every secular act of life is enjoined as of universal application.

"Fac hoc signum," said Cyril, *"sive edas, sive bibas, sive sedeas, sive stes, sive loquaris, sive ambules, sive in omni negotio,"* &c., &c. The cross is the sacred symbol of Christianity, and the making the sign a very old and inveterate practice. What would Protestants say if a Catholic majority in the School Board should enjoin this practice upon the teachers and children in the public schools? Would they listen to the plea that no believer in the death of the Redeemer on the cross could reasonably object to the emblem of salvation? Would not their answer be—The sign of the cross, whatever it may have once been, is now the peculiar symbol of Roman Catholicism; as such, it cannot be tolerated in schools paid for and to be used by Catholics and Protestants alike. Surely, then, the Catholic had a right to object to this "flag of Protestantism on our school-houses;" to say, reading the Bible without note or comment, is the peculiar symbol of Protestantism, and is not to be tolerated in schools established by Catholics and Protestants alike?

The question was one of conscience. The resolutions had been passed with an honest desire to bring the fifteen thousand Catholic children of the district into the common schools. The Catholic body were one-third of the entire population. They protested against the imposition of taxes to pay for the reading of the Protestant Bible. They were supported by three Jewish Rabbis, who had preached in support of the School Board, and had protested that they ought not to be taxed to pay for the reading of the New Testament. The Hicksite Quaker declared his conscience offended. Other Churches without creeds, but not without purpose to serve the truth and live many lives, were taxed to support a view of the Bible which they did not entertain: for to them the Bible was not a sacred book distinct from other sacred books. Other unbelievers came, to whom the counsel for the plaintiffs denied all rights, and they too claimed liberty of conscience. On what ground could they be

denied, unless the State was prepared to proclaim an established religion?

The counsel for the Board denied that Christianity was part of the Common Law of America. It had been part of the law of the land, when Williams had been sent into the backwoods in the depth of winter because he had preached liberty of conscience; when Quakers were banished and Quakeresses hanged; when the penalty of death had been imposed on Catholic priests for taking the sacrament to the dying faithful. It was part of the Common Law of Virginia when dissenters were required to build the churches of the Anglican cavaliers; but in consequence of the labours of the Protestant Roger Williams, and the Catholic Garrard, and the infidel Jefferson, Christianity was not now a part of the Common Law of Ohio, or of any State in the Union.

While the other side had maintained that Christianity had furnished republicanism with its model, had produced the best patriots, men like Hampden and Cromwell, and had on that account been incorporated into the Common Law of America, the counsel for the defendants maintained that republicanism was not due to the Christian elements in the culture of the people. Christianity had nothing to do with politics. Its fundamental theory was a denial of the value of the things of this life as compared with the inestimable possession of the things of another. The equality on which Christianity insists is a spiritual, not a temporal equality. It is equality before God, not before the law. Whenever its teachers have spoken of equality they have pointed to the world beyond. Hence the virtues which Christianity enjoins are those of meekness, resignation, obedience, self-denial, &c., noble virtues, but not such as lead to the establishment or maintenance of a democracy or a republic. Neither Hampden nor the men who fought at Lexington were men who tendered their right cheek after they had been smitten on the left. The truth is, that political freedom is born of the spirit of stalwart self-assertion; of the readiness to do battle for personal right; of

the disposition to quarrel about a penny or a pound which as ship-money or in any other way is wrongfully exacted; and to resent every injury to the person. Owing to the fact not having been recognised that Christianity only had to do with another life, Christianity had been for twelve hundred years the faithful handmaid of despotism.

For these reasons they maintained that Christianity was not and could not be the foundation of American republican institutions. Such being the case, the State could not teach religious truth according to the belief not even of the whole of Christians, but of only a part of those professing Christianity. The State and religion were independent of each other. It might be true, nay, they knew it was true, that there was a section of the population which wished to get rid of the public schools altogether. Such persons had a sinister, ulterior purpose. The real object of their agitation was to distribute the school fund among the religious sects and denominations. But the School Board had no such object. They wished rather to defeat these persons by removing the only fulcrum on which the lever, to be used in dismantling the edifice of public education, could rest. They wanted to say to honest Roman Catholics—your complaints are groundless. The schools are open to all. There is nothing done or taught in them to which the most conscientious among you can take offence. No sectarian flag flaunted by bigots floats over the schoolhouse. No spirit enters there but that of peace and good-will towards all men and creeds.

For the arguments in full we must refer our readers to the volume itself. It is sufficient to report that the resolutions were declared by a majority of the Court to be illegal, and the *injunction was made perpetual*.

We have gone into the arguments at some length, because, as we have said, the questions raised are such as we shall have to face in this country before many months have passed. The arguments used by the counsel on both sides can hardly be called legal; they may be called constitutional without

much violence.. But, as was perhaps necessary in the case of speeches which were intended for the outside public quite as much as for the Court, they are full of what can hardly be called either legal or constitutional argument. This, while it renders the volume a somewhat curious specimen of a legal book, adds much to its interest. Arguments founded on Milton and Shakespeare, Homer and Virgil, with a glance at Confucius and the opinions of the founders of the American Republic, are not what one expects to find in a legal discussion. The volume, however, gives a favourable specimen of American oratory, and on this account, as well as for the reasons we have already given, we have great pleasure in commending it to our readers.

ART. V.—DEFECTIVE STATE OF INTERNATIONAL LAW.* By PROFESSOR LEONE LEVI, of Lincoln's Inn, Barrister-at-Law.

IT is much to be regretted that whilst proper remedies are available of a preventive, suppressive, and penal character, against crime, the ordinary disease of the body politic, there are no remedies either of a preventive, suppressive, or penal character against war, the highest and most pernicious crime in the commonwealth of nations, unless it be, indeed, its own condign retribution: It is supposed that International Law is able to subordinate the relations of States to the dictates of natural law, and that though nations acknowledge no superiors, they are yet under the same obligation mutually to practice honesty and humanity. But, alas, experience shows that International Law is not able to effect

* This article contains the substance of a paper recently read at the Social Science Congress, Newcastle-upon-Tyne.

its own noble mission. That law does indeed afford a standard of high maxims of right and justice, by which the acts of States may be judged, but fails altogether in the means of securing adherence thereto, and many are the acts which that law reprobates, that continue to be committed with the utmost impunity. Can nothing be done to place the public law of the civilised world on a firmer footing than it stands at present? Is there no mode for supplying the serious shortcomings of International Law?

The root of weakness in International Law is, that it is not a law. A law, in its special restricted sense, is a command or precept, emanating from some superior authority, and constituting a rule of action which an inferior is obliged to obey. Not so with International Law. That is only a body of principles or opinions enforced, not by physical but by moral sanctions. Nor is there much certainty or authority in the sources of such principles. Natural law, divine law, the reason of the thing, the customs of nations, the express agreements of States, the judgments of Prize Courts, the dicta of learned writers have each and all elements of weakness in them. Natural law is a sentiment rather than a principle. Divine law is unheeded by some, denied by others. The reason of the thing is often not very transparent in particular cases. The judgments of Prize Courts frequently reflect the opinions of the State under whom they are instituted. Treaties are easily disregarded or broken, and the statements of writers of the law of nations are often uncertain and conflicting.

Setting aside, however, these inherent defects, generally, we may say, International Law is composed of two elements, the natural and the conventional. The natural element is common to all nations. Like the *jus gentium* of the Romans, it embraces all those principles of morals which are implanted by the Author of Nature in the heart and mind of every one, of whatever clime or race, and which ought to regulate the acts of every individual of every State in their mutual

relations. The duty of being faithful to one's engagements, or of acting in good faith, or of respecting the rights and property of others, are necessarily alike in every country, and are as binding on the State in its collective capacity as a moral person as on an individual. The conventional element of International Law is that which results from the practice of nations, from the judgments of their Prize Courts, and from express agreements or treaties. There are leading cases in the law of nations as in municipal law. The declarations made by ministers or ambassadors, the diplomatic correspondence, the conduct of States, constitute so many evidences of the positive obligations of States. But those two elements, the natural and the conventional, are often intermixed and often separate. There may indeed be a natural obligation where there is not a conventional, but there is scarcely a conventional without the natural element bound up with it. Unfortunately, however, of the two elements the natural, that which is the most unchangeable and universal, is also the less certain in its operations and authority. Could we give to the universal principles of natural law the same certainty as is possessed by the conventional, we should not have to lament the weakness and uncertainty which characterise by far the greater part of the law of nations. As it is, the structure of International Law is most defective and unsatisfactory. If, as according to some, the law of nations in reality consists of the practice of nations, for what practice, however unhallowed, can we not find ample precedents? If, as according to others, it consists only of the aspirations of philosophers and moralists, or of the dictates of natural or revealed religion, we have always the ready answer, that its principles, however wise and beneficent in theory, are not suitable in practice.

For many of the evils and difficulties which often disturb the intercourse of nations International Law is certainly not responsible. It is the political system that is at fault. It is from the defective organisation of States that the

greatest troubles arise. International Law takes the States composing the great commonwealth of nations such as they are, but it cannot guarantee their permanent existence. Since the Treaty of Vienna, which was supposed to have settled the public law of Europe, and established a balance of power among its different States, Italy has become a kingdom, the German Confederation has been destroyed, the Republics of Frankfort and Cracow are extinct, Belgium is parted from Holland, and another Napoleon has reigned in France. Matters connected with the internal government of a State and matters relating to its external relations appertain to political science, and not to International Law, and in practice there is, alas, too great a difference between politics, which are too often prompted by the lust of power or expediency, and International Law, which proposes to set forth the dictates of eternal justice. In the relations of States in time of peace International Law enjoins the observance of all those duties which the safety of the general society requires, and commends the performance of those offices of humanity which may tend to the preservation and happiness of other States, and to promote their intelligence, power, and freedom; but how often the political system of States has been based on selfishness and exclusiveness. Nor would it be right to attempt to enforce what are simply moral duties, whether in international or social relations, for they are duties which do not produce corresponding rights, or rights which do not produce corresponding duties. It might be an act of enmity on the part of a State to refuse to trade with another, but no one could compel it to do so without violating its own right of freedom. We had no more right to compel China to take our opium than China would have to compel us to receive her tea duty free.

It is, however, when we come to a state of war that the defective character of International Law becomes most apparent. Amongst the many works on the subject, Grotius's "*De Jure Belli ac Pacis*" holds certainly the first and highest

rank, and this work was suggested, as he said, by the natural horror with which he beheld the frequency and atrocity of the wars in which every State was engaged on the most trifling pretext. "I have been for a long time convinced," he said, "that there is a God common to all nations, who watches both the preparation and the course of war. I have remarked, on all sides in the Christian world, such a wanton license as regards war, that even the most barbarous nations should blush for. People turn to arms without reason, and for the slightest object, and they trample under foot all Divine and human laws as if they were authorised, and were quite resolved to commit all sorts of crime without any check." Grotius wished to put a stop to such barbarism, and he conceived the thought of bringing the precepts of Scripture, as well as the dicta and sayings of philosophers and moralists, having a direct bearing on matters relating to peace and war, clearly before the civilised States of the world, in the hope that these might, by their own moral force, succeed in establishing a law which no civilised State might feel itself at liberty to disregard. That great influence was exercised by that and subsequent works on International Law is incontestible.

What we lament is that whilst, on what may be considered insufficient and unsatisfactory ground, at least in that religious aspect in which Grotius first discussed the question, both he and the other principal writers of the law of nations declared that, under certain circumstances, war is lawful, neither Grotius, nor any other writer, sufficiently defined the precise circumstances under which war may be justifiable. Following the analogy of criminal law, Lord Bacon said:—"As the cause of a war ought to be just, so the justice of that cause ought to be evident, not obscure, not scrupulous; for, by the consent of all laws in capital cases, the evidence must be full and clear, and if so where one man's life is in question, what say we to a war which is even the sentence of death upon many?" It is, I conceive, too loose a statement to say that war is lawful

to prevent or redress a wrong, to obtain a reparation against an injury committed or threatened, or for any act committed or expected to be committed affecting the independence of a State, or the free enjoyment of its rights. What, if the wrong be of a most trivial character? What, if the threat be imaginary and not real? Looking back to the ordinary cases of war, how few of them can be resolved into wars simply of self-defence! There have been wars of pillage, conquest, and domination, where the Cæsars, the Alexanders, and the Napoleon Bonapartes claimed an universal empire. There have been religious wars, as where the Greeks fought for their Temple in Delphis, where the Huguenots fought for their existence in France, and where Protestantism asserted its rights, arms in hand, in Germany. And there have been wars for the maintenance of a principle, as those of the French Revolution and the wars of Austria in Italy.

But the most prolific causes of war in modern times have been the balance of power and intervention, both of which infringe a cardinal principle of International Law, the principle of the sovereignty of States. What is the balance of power it is not easy to determine, but its object would seem to be so to distribute the forces of the different States, that none shall have the power to impose its will on, or oppress the independence of, any other State. Let any State extend its forces or multiply its resources beyond a certain limit, and according to that principle a cause is at once given to every other State to unite in checking this unwonted aggrandisement. Nor is this principle a simple theory, since the treaties of Westphalia, Utrecht, and Vienna, have, in effect, reduced it into positive law. But has not every State an absolute right to increase in power, forces, and wealth? Can we prevent the substantial sources of aggrandisement which lie in the superiority of race, in greater capacity for labour, and in the strength of higher morals? The power of a State does not consist merely in the extent of its territory, or in the number of its population, but in the wisdom of its administration, in the activity of its inhabitants, in the full development of its

resources. Against this development no balance of power can be of any avail. Most-mischievous was, moreover, the principle of combining all the States of Europe on every isolated emergency; thus uselessly extending the ravages of war, and bringing nations into the fray which had no interest to defend or any wrong to avenge.

But we have not done with this principle. The present war between France and Prussia had its origin in the jealousy of France for Prussian aggrandisement in Europe. It is another war caused for or by the balance of power. Can it be considered a just cause of war? The authority of Grotius upon this point is of the greatest value. "We cannot admit," he said, "the validity of what some authors have taught that, according to the law of nations, it is lawful for us to take arms in order to enfeeble a State whose power is increasing, lest, if allowed to increase too much, it should be in a position, when occasion arises, to do us injury. We allow, that when deliberating whether we should make war or not, such considerations may have their weight, not as a justification, but as a motive of interest, so that if there be a just reason to take arms, the fact of the aggrandisement of such State may render it prudent, as well as just, to declare war. But that we have any right to attack a State for the simple reason that she is in a condition to injure us, is contrary to all rules of Equity. War is lawful only when necessary, and it cannot be necessary unless we have a moral certainty that the power we fear has not only the means but the intention of attacking us."—Grotius, Book II., ch. i., s. 17, and Book II., ch. xxii., s. 5. It is clear, indeed, on every ground, that the war which now agitates and afflicts Europe is altogether a gratuitous breach of International Law.

But another principle is being evolved at this moment in Germany and Italy. It is the principle of Nationality. It is true that Prussia has stretched the bounds of her territory far and wide in Germany, that she has absorbed Hanover, destroyed the Republics of Frankfort, subjected

the Hanse towns, and rendered Saxony and Baden subservient to her will. But she is only placing herself at the head of a German nationality. Equally true it is that Sardinia made war on the King of Naples, absorbed Tuscany, got hold of Lombardy and Venice, and now appropriates even Rome; but she has acted throughout on the principle, and asserted the right, of an Italian nationality. What constitutes true nationality, and whether it results from identity of language and literature, from unity of race and descent, from the possession of a national history, or from geographical position, it matters not. Suffice to say, that where the sentiment of nationality does exist in any force, there is a *prima facie* case for uniting all the members of the nation under the same government.

But admitting that a nation has the right to constitute itself into a people or separate State, has it a right to claim, even by force of arms, any portion of that people which hitherto may have formed part of another nationality, or have been subject to another State? Take the case of Rome at the present moment. Have the Italians any right to that province or State? The only answer is that the right of nationality must be held superior to any right arising from the present organisation of States. The spirit of nationality is strong and enduring, and it is because it is not sufficiently recognised in the constitution of States that we have to lament the frequent occurrence of revolution and war.

Interventions have also been frequent causes of war. On the principle that, whenever a sudden and great change takes place in the internal structure of a State, dangerous in a high degree to all neighbours, they have a right to attempt by hostile interference the restoration of an order of things safe to themselves, or at least to counterbalance, by active aggression, the new force suddenly acquired, Russia, Prussia, and Austria arrogated to themselves the right of interfering with any changes in the political system of the Italian States. France intervened in Spain to reverse the national party, and to re-establish absolute government; Russia, Prussia,

and Austria tore to shreds, and divided among themselves, poor distracted Poland. In most cases, let it be observed, it was the strong that interfered in the affairs of the weak, and it was rare indeed when such interventions were suggested from any regard to the interest of the weak. But even if it were, that would not justify the intervention. It might appear a chivalrous act on the part of a strong power to offer its aid to a weak State at a moment of danger, but universal experience proves that no State can long maintain its independence if it is to be beholden for it to the support of another power. It should be remembered, moreover, that an armed intervention is war, and that no duty of friendship or generosity can justify the unsheathing of the sword, and the perpetration of so much evil as war brings in its train.

But there is another kind of intervention of an amicable character in which we are at present deeply interested. In its primary sense the word "intervention" means to come in between things or persons, to interfere in the affairs of another. Has a nation any right to exercise such interference? Does the community of interest, which binds us altogether, give us a voice in the acts and conduct of other States? Can we force our offices or interpose our action on an unwilling nation? To do so would be to infringe the sovereign rights of other States—would be to incur the certain danger of war. And it is the same thing whether we interfere *officiously* by verbal notes through our ambassadors, or *officially* by formal notes or letters, or by the proposal of a congress, or in an armed manner preceded by an ultimatum, and accompanied by a military demonstration. In either case the intervention would be the sole act of the intervening party, which might be resented or opposed by the parties affected by it. Mediation, on the other hand, is quite another thing. A State may most appropriately at any time offer its good offices for the amicable settlement of a dispute. It may be asked by the contending parties themselves to make proposals for such settlements without binding themselves to accept such proposals; or may be constituted arbitrator to decide the question. There is

no interference in mediation. It is not a forcing of one's own will or action upon others, but it is only the manifestation of willingness and readiness to perform a friendly act. What should be done in the present difficult position of France and Prussia? Should England intervene? Notes verbal or official would be of little purpose. For a congress they are not ready. An armed intervention would be war to either State or to both. Surely, then, no intervention is possible. But it is otherwise with mediation. This may be offered at any time without any danger of wounding the susceptibilities of either power.

The only justifiable cause of war, if we once admit its lawfulness, is self-defence. England, for instance, has mighty interests to defend at home and abroad. She has an enormous trade; she has unbounded wealth; she has colonies and dependencies widely scattered and isolated; she has an extensive number of subjects planted in every part of the habitable globe. Nothing could be more natural than that she should be jealous of her rights, and that she should be prepared to defend them at all hazards. But a limit must be put even to this right of self-defence. Many of the wars for the balance of power were waged on the plea of self-defence, and the enlargement of a State, though more than thousands of miles distant, has been held sufficiently dangerous to justify a war. But surely nothing short of actual invasion of territory, nothing less than an act of aggression on the sovereign rights of a State, should justify a war of self-defence. International Law has given even to this principle too great a latitude, and the European nations have been too prone to use it as a convenient justification for acts of unhallowed aggression.

When war has once been declared it seems almost puerile to spend much time in settling the exact bounds to which the belligerents may lawfully proceed, for bitter experience proves that when the passions are unfurled, the reign of law is at an end. We may wish, however, that even as respects the conduct of nations in time of war, International Law should be more definite and consistent. It is a sound

principle that, whilst whatever is likely to be conducive to the accomplishment of the enterprise is allowable, whatever has not that object directly in view is not to be held lawful. But the principle is neither properly carried out nor universally applied. It may be right, because necessary, in a belligerent to capture soldiers, military officers, and arms, but no such justification exists for the capture of goods and property of private individuals. Nevertheless, whilst International Law seems to disallow the capture of private property by land, except, indeed, in case of fortified towns, in the form of booty, it permits it by sea. The United States of America proposed in 1856 to accept the regulation relating to the abolition of privateering, on condition that private property on the high sea should be exempted from seizure. But England did not accept the proposal. Now Prussia has taken the initiative in this important reform. Let us hope that at a future congress the principle may be established by the consent of all nations. Upon the principle that war should be waged against the armed forces of the belligerent, and not against inoffensive subjects or places, no private individuals should be captured or shot, and nothing should be destroyed but what may be used as means of offence and defence in actual warfare. Yet we still hear, though International Law does certainly not justify it, of wanton practices against whole populations, of the destruction of ports of trade, and of the bombardment of places not fortified. The right of search also as practised in former wars is vexatious and needless. Since it is the destination that determines whether an article is contraband or not, it should rest with the belligerent cruiser to bar, if he can, the entrance of such into the enemy's country, without disturbing for that purpose the entire trade of the world. The case of the *Trent*, during the American War, showed the necessity of having it declared, that packets engaged in the postal service, and keeping up the regular and periodical communication between the different countries in Europe, America, and other

parts of the world, should be exempt from visit and search. The list of contraband articles would need to be reduced and rendered more certain. The blockade of commercial towns also can scarcely be defended as useful or necessary, since, by the improvement of internal communication, the enemy is, in most cases, able to provide himself with necessities from other means. Many, indeed, are the improvements needed in the principles of International Law relating to the rights and duties of belligerents.

But not less essential it is to define more correctly the rights and duties of neutrals. It is all important to realise the fact that a state of war between any two States is highly detrimental to the interests of every other nation, who suffer from the destruction of their trade and the diminution of their resources. It is not as a concession, but as a right, that neutrals claim to continue their trade and navigation undisturbed; and it was not more than they were entitled to, when they wrested from the belligerents the principle that the neutral flag shall cover enemy's goods, and that neutral goods shall not be liable to capture under the enemy's flag. But the great question of the duties of neutrals respecting the sale and transport of contraband of war remains to be settled.

What is most important of all, however, in International Law, is to put an end to the obscurity and uncertainty which now exists on many subjects; and I conceive that we could not pursue a better course to that end than by following up the useful precedent set by the Conference of Paris of 1856, in reducing as many of the points as are recognised and acted upon by the civilized States, into so many distinct propositions to be recognised and expressly assented to by all civilized States. If we could bring nations to understand that International Law is really binding upon us, and if we could clothe its precepts with the authority of an express agreement, we should do much to secure a fuller compliance with its requirements. A congress is likely to take place at the conclusion of the present war to

restore order in the political system of Europe. Let us hope that an effort may then be made to put the law of nations on a firmer and more satisfactory footing than it has ever yet been placed.

And since, with the multifarious and complicated relations between States, disputes will ever arise, let us provide some means for their peaceful arrangement without resorting to the fearful alternative of war. The Treaty of Paris of 1856, concluded between Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, has a provision "that if there should arise between the Sublime Porte and one or more of the signing Powers any misunderstanding which might endanger the maintenance of their relations, the Sublime Porte and each of such powers, before having recourse to the use of force, shall afford to the other contracting parties the opportunity of preventing such an extremity by means of their mediation." And, further, in the Protocol of the Congress the same powers, on the proposition of the late Earl Clarendon, agreed as follows:—"The plenipotentiaries do not hesitate to express in the name of their governments the wish that States between which any serious misunderstanding may arise, should, before appealing to arms, have recourse, as far as circumstances might allow, to the good offices of a friendly power." It is true that Count Walewski, as representing France, in approving, added—"That the wish expressed by the Congress cannot in any case oppose limits to the liberty of judgment of which no power can divest itself in questions affecting its dignity." Yet it might have been expected that when England appealed to the protocol, and offered mediation, both powers, and France especially, by whom the offensive was taken, should have consented to submit her grievance, in the first instance at least, to the arbitration of two friendly powers. This important concession to public opinion, however, cannot be allowed to be thus foiled, and it is well to consider by what means the agreement may be rendered more operative.

What is wanted is the formation of an International Council composed of the foreign ministers and ambassadors, for the time being, of all the civilized powers, for the determination of any disputes and difficulties which may arise between such States, to be summoned only when such differences arise. We should guard against the admission of any provision, such as that which was taken advantage of to justify France in withdrawing from the agreement on this last and most fatal war to herself. And it ought to be part of the arrangement, on the example of our municipal jurisprudence in matters of arbitration, that should, notwithstanding such formal agreement, any one power refuse to abide by its engagement, the other power or powers should still appeal to the International Council for the determination of the dispute, and the pronouncement of an award, and that the Council should proceed with the consideration of the question without regard to that refusal. Two important advantages would result from such an arrangement. We should obtain from an impartial tribunal a deliberate opinion on any question which might disturb the peace of the world. And we should have the moral weight of the civilized world brought to bear against the nation which, whether as the aggressor or the aggrieved, refuses to abide by its formal agreement, or to comply with the deliberate award of the International Council. I am not proposing, that in case of such refusal all the States should join with the other powers in enforcing the award. We must not fall into the blunders of another Holy Alliance. We must not, with a view, or in the hope of promoting peace, extend the range of quarrels and wars. Moral reforms can only be achieved by moral means. But I do attach the greatest possible weight to an arrangement which might relieve many States from pursuing a course of hostility to a point where it becomes almost impossible to retract. We must count on the moral feeling, on the honour, on the good sense of nations, and we must strive to put some barrier to the first outburst of passions, by retarding the steps which might otherwise inevitably end in open war.

Too long have we seen, with seeming indifference, this grossest outrage against all that is sacred and humane. Too long have we sat with folded arms, witnessing the fatal course which brought one power after another towards a certain ruin. The suggestion I have the honour of making has already received a certain amount of diplomatic sanction. Let it be matured, developed, and strengthened. But, whether by this or by any other means, let us devote our highest effort to remove for ever from the bounds of the civilized world the demon of war. By all that is sacred in the human breast, by all that is noble, enlightening, and elevating in our advancing civilization, by all that animates us to sentiments of affection and amity towards our brother man, all the world over, let us put an end to this grossest and blackest of all crimes, the crime of war. The natural state of man in society is peace, and not war. Let us ask this noblest of all services from International Law, that it may provide means by which nations may live in peace and concord among themselves.

ART. VI.—THE LAW OF ULTERIOR DESTINATION AS BEARING ON CONTRABAND OF WAR.

THE recent civil war in America presented many cases illustrative of the principles of the Maritime Law of Nations, of which few are more interesting than the law of blockade. For in its connection with contraband of war, and the rule of ulterior destination, or, as it is sometimes termed, *continuous voyage*, a blockade if but moderately well sustained is undoubtedly one of the most effective methods which can be employed by a belligerent in weakening the resources, by cutting off the supplies, of his enemy. But while this is so, it is also well-known that no method, of what we may call negative warfare, is subject to so many disturbing incidents, the effect of which it is almost impossible to avoid. On the one hand, the ships composing the block-

ading squadron may be insufficient in number, or defective in speed, or in calibre; the extent and nature of the coast they are required to cover may be wide and exposed, and they are at any moment liable to dispersion by stress of weather, or may be driven away altogether by a superior force of the enemy. On the other hand, the opportunities presented of evading, or, as it is termed, "running," the blockade, the vicinity of ports belonging to neutral States, which offer facilities for forming dépôts of goods intended for the relief of the place invested, the high premium attending the successful venture, the romantic hazard of the attempt itself; these all combine to render blockade a method of warfare, one not only of great uncertainty and difficulty, but which, in its contact with neutral ships, gives occasion to questions of International Law by no means easy of solution.

These almost inseparable incidents to a blockade have given rise to what are called "paper" blockades, or, as they have been termed, blockades by "notification," or "notoriety," as distinct from actual or effective blockades; the former being an attempt to visit neutral vessels with the penalties attending the violation of blockade, while escaping from the necessity of actually employing a force sufficient to draw the required *cordon* round the invested port. But this practice has, at least in modern times, never received any countenance from civilised States; and it is now a well-settled principle of the Maritime Law of Nations, at all events since the armed neutrality of 1780, to which Great Britain became a party by her convention with Russia of January, 1801, that, to use the language of the powers assembled at Paris, in the Congress of 1856, when the subject received much consideration, "blockades in order to be binding must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy."*

* And see on this subject of blockades by "Notification," and "Notoriety," *The Betsey*, 1 Ch. Rob., p. 95; the *Mercurius*, *ibid.*, p. 83; "*Northcote v. Douglas*," 10 Moore, F.C. Rep., p. 59.

It is, however, with one only of the incidents to a blockade stated above that we have now to do, that, namely, which arises from the vicinity of neutral ports at a short distance generally from the blockaded coast, which while ostensibly affording a neutral terminus and place of consignment for the cargo, are in reality depôts from which the necessities of the place may effectually be supplied. The voyage, in short, is broken in two. The first stage is between neutral termini; the transport of the cargo assumes the form of a legitimate transaction of commerce, and the ship is free as being the property of a neutral trader. The second stage is for the relief of a belligerent port; the goods are contraband of war, and the vessel, if caught *in delicto*, is from the outset of her hazardous voyage liable, together with her cargo, to capture and confiscation as prize of war. Can these consequences be, by relation back as it were, made to attach on the first stage also? Can a venture, to all intents legitimate, be infected with the taint of contraband, to be inferred from the supposed ulterior intention or purpose in the minds of those engaged in the transaction, or was there "*locus penitentiæ*," in the intermediate and neutral port? The reply to these questions involves the doctrine of what is known as that of "continuous voyage," or, as some have termed it, "ulterior destination," upon which some difference of opinion has existed, as between the courts of this country and those of the United States, a difference resting on principles which it is now proposed to examine.

The rule to which this doctrine is a corollary is well known. As it is stated by Sir W. Scott, the sailing with an intention of evading the blockade is a beginning to execute that intention, and is an overt act constituting the offence; and from that moment the blockade is fraudulently evaded.* To a similar effect is the language of the Supreme Court of the United States in one of the most recent cases on the subject, in which the doctrines underwent examination.

* The *Columbia*, 1 Rob. Rep., p. 154.

"It is," said Chief Justice Chase, "a well established principle of prize law as administered by the Courts of the United States and of Great Britain, that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel, and in most cases the cargo, to capture and condemnation.* We are entirely satisfied with that rule. It was established with some hesitation when sailing vessels were the only vehicle of ocean commerce; but now when steam and electricity have made all nations neighbours, and blockade running from neutral ports seems to have been organised as a business, and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights. It is not likely to be abandoned until the nations by treaty shall consent to abolish capture of private property on the seas, and with it the whole law and operation of commercial blockade."†

Acting therefore upon this view of the law, it was decided by the Court that a vessel sailing from a neutral port, with intent to violate a blockade, is liable to capture and confiscation as prize from the time of sailing; and that the intent to violate the blockade is not disproved by evidence of a purpose to call at another neutral port, *not reached at the time of capture*, with ulterior destination to the blockaded port; and further, that evidence of intent to violate blockade may be collected from bills of lading of cargo, from letters and papers found on board the captured vessel, from acts and words of the owners and hirers of the cargo and their agents, and from the spoliation of papers in apprehension of capture.

So far as regards the destination of the vessel itself; in the case in question, however, the Court proceeded to deal with the cargo, and in doing so gave, as will be seen, to the doctrine of continuous voyage an extension of which it had not before been considered as capable.

"Neutrals," said the Chief Justice, "may sell in their own

* *Yeaton v. Fry*, 5 Cranch, 335; 1 Kent Com., p. 150; the *Frederick Molke*, 1 Rob., 72.

† The *Circassian*, 2 Wallace's Rep. (Supreme Court) p. 135, and see the *Admiral*, *ibid.* 3, p. 603.

country to belligerents whatever, belligerents may choose to buy. The principal exceptions to this rule are that neutrals must not sell to one belligerent what they refuse to sell to the other; and must not furnish soldiers or sailors to either, nor prepare, nor suffer to be prepared, armed ships, or military, or naval expeditions against either. So, too, neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband or not, if intended for actual delivery at the port of destination, and to become part of the common stock of the country, or of the port. . . British merchants had, as neutrals during the war, a perfect right to trade, even in military stores, between their own ports, and to sell at one of them goods of all sorts, even to an enemy of the United States with knowledge of his intent to employ them in rebel war against the American Government, provided only the trade were a real trade, in the course of which goods, conveyed from one port to another, became incorporated into the mass of goods for sale in the port of destination, and provided sale means sale to *either belligerent* without partiality to either. If, however, there was an intention, or, as the Court termed it in a recent case in this country, 'a mental process,' of sending the goods forward to a blockaded port, it has been held that there is, as far as the cargo is concerned, one continuous voyage which cannot be broken by any transaction at the intermediate port, by their being unladed, transhipped, transferred from hand to hand, or even sold, unless it be a *bona fide* sale in the market. They are, therefore, liable to capture and confiscation on the outward voyage to the neutral port. So also is the ship, unless there be reason to conclude that her owners were ignorant of the ulterior destination of the cargo, and did not hire their ship with a view to it. But if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage must attach to the earlier undertaking with the same cargo, and in continuity of conveyance. The ships are planks of the same bridge, all of the same kind, and all necessary to the convenient passage of persons and property from one end to the other." *

* The *Bermuda*, 3 Wallace's Rep., 514. The *Stephen Hart*, *ibid.*, 559. The *Springbok*, *ibid.*, v. 1.

This decision has given to the doctrine of continuous voyage an important influence, as bearing upon and restricting the privileges of neutral States. The principle itself has been considered to take its rise from what is known as the Rule of War of 1756, under which a neutral cannot carry on trade between a belligerent country or its colonies if he were excluded from that trade in time of peace. It is thus spoken of by Sir W. Scott, in a celebrated judgment,* which states very clearly the law as it then existed, and which indeed may be said to have given the rule much of the influence which it exercised on the colonial trade of an enemy during the earlier part of the present century. Regarding the question as affecting neutral property, he observes:—

“Upon the breaking out of a war it is the right of neutrals to carry on their accustomed trade, with the exception of the particular cases of a trade to blockaded places or in contraband articles (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search; in which case, however, they are entitled to freight and expenses. I do not mean to say that in the accidents of a war the property of neutrals may not be variously entangled and endangered; in the nature of human connections it is hardly possible that inconveniences of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it; these inconveniences are more than balanced by the enlargement of their commerce; the trade of belligerents is usually interrupted in a great degree, and falls in the same degree into the lap of neutrals. But without reference to accidents of the one kind or the other, the general rule is, that the neutral has a right to carry on in time of war his accustomed trade, *to the utmost extent of which that accustomed trade is capable*. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in time of peace, and which in fact can obtain in war by no other title than

* *The Immanuel*, 2 C. Rob., p. 286.

by the success of the one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title."

Such being the rule under which a neutral could not export goods *directly* from the mother country of the enemy to its colonies, it is plain that it was susceptible of evasion by the simple expedient of the neutral first importing such goods to his own country, so as to make them part of the national stock of that country, and then exporting them to the enemy's colonies. And hence arose questions, of some difficulty then, and of still greater difficulty and embarrassment now, as to what amounted to a direct trade, or what was to be regarded as an intermediate *bonâ fide* importation to a neutral country. And though the Rule of War of 1756 has become obsolete, inasmuch as the free trade which England has thrown open to the navigation of the world enables other nations to participate in her colonial and coasting trade on an equality with her own vessels, and has thus practically repealed a law which had its foundation in a monopoly, yet from the extension which, as has been observed, the doctrine of continuous voyage (a direct inference from the rule of 1756) has received, the decisions of English and American Courts of Prize on the interpretation of the rule must continue to be referred to, and have always in the most recent cases been cited, as containing a correct exposition of the law of nations on the subject. The principles upon which Courts of Admiralty act in determining such questions have been so well stated in a celebrated judgment of Sir W. Grant, in the leading case of the *William*,* in which will be found an elaborate examination of the decisions, that we make no apology for giving the following extract:—

"What, then," said the learned judge, "with reference to this subject is to be considered a *direct voyage* from one place to another ?

* 5 C. Rob., 385; Lords, March 11, 1806.

Nobody has ever supposed that a mere deviation from the straightest and shortest course in which the voyage could be performed would change its denomination, and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of the deviation, whether it be of more or fewer leagues, whether towards the coast of Africa, or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change because a party may choose arbitrarily, by the ship's papers or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the determination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board; would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not be always discernible, but when it is discerned, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence, to show the purpose for which the acts were done; but if the

evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of having ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them—the landing of the cargo, the entry at the Custom House, and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are mere voluntary ceremonies, which have no national connection whatever with the purpose of sending on the cargo to another market, and which therefore would never be resorted to by a person entertaining that purpose except with a view of giving to the voyage which he has resolved to continue the appearance of being broken by an importation which he has resolved not really to make.”*

These extracts, from the judgments of Sir W. Grant and Sir W. Scott, will place our readers in a position to understand the development which this doctrine of continuous voyage has received at the hands of American judges, and this we shall now proceed to notice. But, in connection with the doctrine in question, the difference that formerly obtained between cases of breach of blockade and those of contraband of war should clearly be kept in view. Contraband, it was held, if met with on the high seas, was always subject to capture and confiscation as prize; whereas ships and cargoes, on their way to a blockaded place, were not, as far as the decisions went which have been quoted, of necessity so, unless the offence was established of an intended or actual breach of blockade. And as a blockade was an act of maritime warfare only, and could only be maintained by sea, if the final stage of transit

* And see the *Polly*, 2 Rob., 361; the *Maria*, 5 C. Rob., 365.

of the goods, the last plank, so to speak, of the bridge, was by way of inland navigation, as by river or canal, or overland, there was held to be no offence, because there could, in such a case, be no breach of a blockade, inasmuch as the taint of the voyage was purged when the goods were landed. And it was in breaking in upon this principle that the alteration in the law, occasioned by recent American decisions, mainly consisted; for they held that, in deciding the question as to which was to be regarded, the ultimate, or the immediate, or ostensible, destination of *the cargo*, as distinct from the ship, not only cases were to be included which came within the Rule of War of 1756, but also those where a subject of the capturing power was supposed to be trading with the enemy, or a neutral engaged in sending contraband of war, and generally every case in which the destination of a vessel, or cargo, was material.*

The leading case on this subject in the American courts is the *Commercen*,† in which, as Professor Dana has observed, the question was discussed with great learning and ability, and the arguments in which, it may be added, will be full of value to the student of International Law. It was there decided by the Supreme Court of the United States, that if goods were destined for the avowed use of the enemy's army or navy, they are liable to forfeiture even though the property of a neutral; and, further, that the destination to a neutral port could not vary the application of the rule, inasmuch as it was only doing that indirectly which, in direct courses, was prohibited. In this celebrated case, which gave rise to a remarkable difference of opinion amongst the eminent jurists who then had seats in the Supreme Court, the facts were that a Swedish vessel was carrying a cargo of provisions, the property of English merchants, to a Spanish port, there to be delivered to the British army engaged in hostilities against France in Spain.

* Note by Professor Dana, Wheaton, Inter. Law, p. 508.

† Wheaton's Rep., p. 382.

Great Britain was at the time at war with the United States ; but between France and the United States there was no alliance or common action. Sweden and Spain were, on the other hand, allies of Great Britain in the war against France, but were neutral in the war against the United States. The cargo was condemned as enemy's property, but the ship was released ; and in the Court below, the District Court of Maine, freight was allowed according to the rule of the Consolato del Mare, and the ancient practice in cases where enemy's goods are captured on board a neutral vessel. But Mr. Justice Story, in the Circuit Court of the United States,* reversed the judgment of the Court below so far as it allowed freight, and held that though, strictly speaking, it was not a question of contraband, for that can arise only when the property belongs to a neutral, and in this case the property belonged to an enemy, yet that the ship-owner in carrying provisions for public use, and under a public contract, was assisting the military operations of the enemy. He pronounced, accordingly, the voyage to be illicit, and inconsistent with the duties of neutrality equally as the carrying of enemy's despatches, or the conveyance of military persons in his employ ; and this decision was confirmed by the Supreme Court, who held, however, that it made no difference, as against the confiscation of the ship and cargo, that the enemy is carrying on a distinct war in conjunction with his allies *who are friends of the captor's country*, and that the provisions were intended for the supply of his troops engaged in that war, or that the ship in which they are transported belonged to the subjects of one of those allies. Chief Justice Marshall, however, and two other judges, differed from this conclusion, and were of opinion that a remote and consequential effect of an act was not sufficient to give it a hostile character ; its tendency to aid the enemy in the war must be direct and immediate.

It is to be observed, however, that although this case is

* 2 Gall. Rep., p. 260.

relied upon, and commonly referred to, as having given great extension to the doctrine of continuous voyage in connection with contraband of war, questions which at the same time were indirectly involved, and which supplied considerations which influenced the opinions of the majority, it in reality turned upon another point, that, namely, of the service in which the ship was engaged having given her an enemy character, in which view her destination became immaterial. The group of cases* decided at the close of the recent civil war in America are those which must rather be cited as having placed the doctrine of continuous voyage on its present footing, which, if the principles of public maritime law then laid down are adhered to, will greatly restrict the privileges of the neutral trader. From the case of the *Circassia* we have quoted at the commencement of this article, and the principle to which that decision gave effect was recognised in the case of the *Peterhoff* before the Supreme Court of the United States, where the whole question underwent examination, in a case which was described by the Chief Justice as "one of much interest, very thoroughly argued, and attentively considered." In his judgment Chief Justice Chase thus states his view of how the law on this subject at present stands :—

"It is an undoubted general principle, recognised by the Court in the case of the *Bermuda*, and in several other cases, that an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade. The question now is whether the same consequence will attend on an ulterior destination to a belligerent country by inland conveyance, and upon this question the authorities seem quite clear—that the ship and cargo are in such a case free from liability for violation of blockade. *But contraband merchandise is subject to a different rule in respect to ulterior destination than that which applies to merchandise not contraband.* The latter is liable to capture only when a violation of blockade is intended; the former, when destined to the

* The *Circassia*, 2 Wallace, Rep., 135; the *Bermuda*, 3 *ibid.*, 514; the *Stephen Hart*, *ibid.*, 559; the *Peterhoff*, 5 *ibid.*, p. 28.

hostile country, or to the actual military or naval use of the enemy, whether blockaded or not. The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea. Hence, while articles not contraband might be sent to Matamoras—a neutral port—and on to the rebel region, where the communications were not interrupted by blockade, articles of a contraband character, destined in fact to a State in rebellion, or for the use of the rebel military forces, were liable to capture, though primarily destined to Matamoras. We are, therefore, obliged to conclude that the portion of the cargo which we have characterised as contraband must be condemned.”

And again, yet more strong is the statement of the doctrine by the same learned judge in the *Bermuda*.* In this case it was *inter alia*, decided that (1.) While goods of every description may be conveyed from neutral ports to neutral, if intended for actual discharge at a neutral port, and to be brought into the common stock or merchandise of such port, voyages from neutral ports intended for belligerent ports are not protected in respect to seizure, either of ship or cargo, by an intention, real or pretended, to touch at an intermediate neutral port. (2.) That neutrals may convey to belligerent ports, not under blockade, whatever belligerents may desire to take, except contraband of war, which is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect. Such seizure, however, except in cases of fraud, being restricted to actual contraband. (3.) Vessels conveying contraband to belligerent ports not under blockade under circumstances of fraud, or cargo of any description to blockaded ports, are liable to seizure and condemnation from the commencement of the voyage; and (4.) That a voyage from a neutral to a belligerent port is one and the same voyage, whether the destination be ulterior or direct, and

* 3 Wallace, Rep., p. 514.

whether with or without the interposition of one or more intermediate ports; or whether to be performed by one vessel, or several engaged in the same transaction and in the accomplishment of the same purpose.

"There seems," said the Chief Justice, "to be no reason why the reasonable and settled doctrine applied by Sir W. Grant, in the case of the *William*, to the cargo should not be applied to each ship, when several are engaged successively in one transaction, namely, the conveyance of contraband cargo to a belligerent. The question of liability must depend on the good or bad faith of the owner of the ships. If a part of a voyage is lawful, and the owners of the ship conveying the cargo in that part are ignorant of the ulterior destination, and do not hire their ship with a view to it, they are not liable to condemnation. But if the ulterior destination is the known inducement to the partial voyage, and the ship is engaged in the latter with a view to the former, then whatever liability may attach to the final voyage must attach to the earlier, undertaken with the same cargo and in continuity of conveyance. Successive voyages, connected by a common plan and a common object, form a plural unit. They are links of the same chain, each identical in description with every other, and each essential to the continuous whole."

The extracts here presented to the reader have, it will be seen, an interest of their own at the present time, beyond the subject immediately under discussion, as being the latest utterances of Courts of Prize on the vexed question of neutrality in connection with trade, according as that trade is, or is not, contraband of war, or destined for a blockaded port. But the point they have been chiefly cited to establish is the gradual inroad made on neutral privileges by the extension of the rule of continuous voyage beyond the limits set to the doctrine by the Lords of Appeal in the case of the *William* in the following respects:—First, in its application to both ship and goods; for hitherto as the law had been expounded by the Court of Appeal, it had not been customary, where the port for which the ship

was bound was *bonâ fide* a neutral one, to inquire into the destination of the cargo. Secondly, in the doctrine being for the first time applied to breaches of blockade and conveyance of contraband of war, and generally, as has been stated before, to every case in which the destination of the vessel or cargo is material, whereas formerly it had been regarded as confined solely to cases arising out of the Rule of War of 1756, or when belligerent subjects were engaged in carrying on a secret trade with the enemy. And, thirdly, in what may be termed the principle of relation back, whereby the rule of continuous voyage or "ulterior destination" was made to include articles contraband of war, consigned to a neutral port, the last stage of whose journey was to be effected, and could only be effected, by overland conveyance across neutral territory; in fact, enunciating the principle that, as Professor Bernard states it, "the fate of contraband articles found at sea on board of a neutral vessel, and the liability of the neutral vessel to the consequences of carrying contraband, depend, in all cases, upon what a prize court may regard as the ultimate destination of the goods, no matter how that destination is to be reached."*

It is proper to add that on these points the courts in this country do not appear to acquiesce in the conclusions at which the Supreme Court of the United States have arrived in this question. The case of the *Peterhoff* was in another form (as a cause of marine insurance),† argued before the Court of Common Pleas, and in delivering the judgment of the Court, the Chief Justice Erle distinctly held that the defendant could not rely on the proximity of Matamoras to the Confederate States, nor could its position be the subject of judicial notice.

"If the goods," he observed, "were in course of transport from a neutral to a neutral port, the better opinion (see the authorities

* *Neutrality of Great Britain*, p. 316.

† *Hobbs v. Hemming*, 17 Com. Bench, N.S., p. 819.

collected in 'Ortolan's Diplomatic de la Mer,' Vol. II., p. 181), seems to be that war does not give to a belligerent any right to seize them on account of their quality. The allegation that the goods were shipped for the purpose of being sent to an enemy's port is an allegation of a mental process only. We are not to assume, therefore, either that the plaintiff had made any contract, or provided any means, for the further transmission of the goods into an enemy's State, or that the shipment to Matamoras was an unreal pretence. If the goods were in course of transshipment, not to Matamoras, but to an enemy's port, the voyage would not be covered by the policy, and that defence is raised in direct terms by the third plea. Here the allegation does not deny the destination to the neutral port to which the insurance relates, but introduces a purpose existing in the mind of the assured *after the termination of the voyage*, for the ulterior disposition of the cargo and ship. It is consistent with that purpose, as here alleged, that the plaintiff made the consignment for mercantile profit as the end to be attained by him, in other words that he knew of an effective demand for war-like stores at Matamoras, and was induced to send a supply by expectation of a high price, and that he expected that the purchase would probably be made on behalf of the Confederate States, and in that sense had the purpose that the goods should pass into those States. In this sense price was the ultimate end which he purposed to attain, and Federal and Confederate were alike indifferent as means, provided he attained that end, and in a neutral territory he could lawfully sell to either."

After observing on the distinction between a mere mental purpose that an unlawful act should be done, and a participation in the unlawful transaction itself, as illustrated by the cases of *Holman v. Johnson*,* and *Lightfoot v. Tennant*,† the Chief Justice proceeded:—

"If goods fit for immediate use in war, and therefore of the quality denoted by the term contraband of war, are passing between neutrals, it seems that they are not liable to seizure by a belligerent. The right of capture, according to Sir William Scott's opinion,‡

* Cowp., p. 341.

† 1 B. & P., p. 551.

expressed in the case of the *Imina** attaches only when they are passing on the high seas to an enemy's port. The liability, therefore, of these goods to lawful seizure, although their quality were such as to make them contraband of war, *depended on their destination*, and they were not liable unless it distinctly appeared that the voyage was to an enemy's port."

From this case, therefore, it may be inferred that if the doctrine of ulterior destination should again come for argument before the courts in England, it would probably be discussed and determined in a spirit less antagonistic to neutral rights than that on which the American judges proceeded, and more in harmony with the decisions of Lord Stowell, and Sir W. Grant, which had previously been accepted as the correct exposition of the Law of Nations on this interesting question.

It may, in conclusion, be important to our readers to note, as bearing upon the question so much discussed at the present time, of what constitutes contraband of war, to observe that the Supreme Court of the United States have laid down, in the most recent case on the subject, to which reference has been already made,† that the classification of goods as contraband and not contraband, which is best supported by American and English decisions, divides all merchandise into three classes. First, articles manufactured, and primarily or ordinarily used for military purposes in time of war. Secondly, articles which may be, and are, used for purposes of war or peace according to circumstances; and thirdly, articles exclusively used for peaceful purposes. Of these, merchandise of the first class destined to a belligerent country, or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.

* 3 Rob., p. 167.

† The *Peterhoff*, 5 Wall., Rep., p. 28.

ART. VII.—THE LORDS' AMENDMENTS TO THE
MARRIED WOMEN'S PROPERTY BILL. By
JACOB WALEY, Barrister-at-Law.

THE following observations were suggested by certain objections which have been made to the Lords' amendments to the Married Women's Property Bill, both on grounds of general principle, and in respect of the increased protection to married women being given by an extension of the equitable doctrine of separate use.

The old theory of English law with regard to the property of a married woman—at all events with regard to her personal property—is, that the husband takes all the property, and with it the obligation of providing for his wife and family. This view, broadly carried out, would no doubt fall very short of the exigencies of modern social life; but, on the other hand, it is an exceedingly one-sided exposition to treat it (as has not unfrequently been done) as equivalent to confiscation—as placing a married woman on the level of a felon. To do this is to separate the right from its correlative obligation, to fix one's attention exclusively on the transfer of property and overlook the onerous condition with which it is accompanied.

The equitable modifications to which the strict legal rule has been subjected, the growth of the doctrine of separate property, protecting a married woman from marital compulsion, and of the restraint on anticipation by which she is shielded from influence, are well known. Less familiar, perhaps, though practically operating in almost every home supported by an expenditure which is to any extent derived from a married woman's settled property, is the rule of Equity, which presumes the consent of the wife to the receipt by her husband (while living with and maintaining her) of her separate income, and debars her from requiring

a retrospective account of its application. The effect of this is in general to give to the husband the administration of the wife's separate income, and to put the wife's separate right in abeyance, except under such unfortunate domestic circumstances as drive her to its assertion. The various equitable modifications of the husband's proprietary right (including the wife's equity to a settlement—that is to say, her right to a provision for herself and her children out of property not settled to her separate use) are created by contract or quasi-contract, including, under the head of contracts, dispositions, such as a will, made by the owner in right of his ownership and not the result of any actual agreement between two or more contracting parties, and treating as quasi-contractual, rights and obligations which are not founded on stipulation or disposition, but have been created by Courts of Equity, to give effect to their views of what is required by duty and justice.

Now, I think it may be said, with something like broad and general truth, that the Married Women's Property Bill, as passed in the Commons, discarded altogether the prior system, and was founded on the primary rule of a woman's proprietary rights being unaffected by her marriage, this rule being modified by grafting on it provisions for the protection of the wife against marital compulsion and influence similar to those obtaining under the prior law; while the Act in its present shape (not differing materially from that in which it passed the Lords), recognises and upholds the prior system, under which marriage *primâ facie* operates as a transfer of property to the husband, coupled with the obligation of maintaining his wife and family; but enlarges and multiplies the quasi-contractual exceptions to this rule in order to meet existing social and moral exigencies. For my own part, I hold strongly to the opinion that the usages and requirements of society are most faithfully reflected and most judiciously carried out by a system, giving to the husband, in ordinary cases at least, the irresponsible admin-

istration, if not the ownership, of his wife's property. Large modifications and exceptions to this rule, varying under different moral and social conditions, will no doubt be required, in order to provide a just and reasonable matrimonial code, but while the marriage tie is what it is, I cannot conceive that entire independence, as regards her property, either ought legally to be conferred on the wife, or can practically be exercised by her. This, however, is a matter as to which the arguments on both sides are already familiar, and I only refer to it as a ground for my own approval of the alteration in the frame of the Act made by the Lords.

I may also name another ground on which the alterations made by the Lords appear to me conducive to the public interest. In the present shape of the Act, the whole body of existing jurisprudence on the law of property as between husband and wife, will be available for the guidance of our tribunals. In cases not expressly provided for by the Act the prior law will be followed. Cases within the provisions of the Act will be brought within the operation of well-known rules and principles, and will be easily dealt with. On the other hand, the Bill, as it passed the Commons, was destructive even more than constructive. It swept away all the existing fabric of law on this subject, and substituted for it mere foundations, on which the new system would have had to be built by a series of judicial decisions. Unless I am greatly mistaken in my estimate of the Bill as originally framed, it must have been worked out by means of a vast amount of litigation, bringing discord and misery into a multitude of homes.

There is, however, another objection made to the Lords' amendments which raises a question of wide scope and of deep interest. It is said that the extension of equitable remedial jurisdiction, created by means of the Lords' amendments, is at variance with the progress towards a fusion of Law and Equity. It is well worth endeavouring to test the soundness of this assertion, and to examine for that purpose in what

sense and with what results we may look forward to a fusion of Law and Equity.

I must in the first place observe that, had the Bill preserved its original frame, the law of property as between husband and wife would still have been a matter partly of legal and partly of equitable jurisdiction. The preservation of separate use and restraint on anticipation when created by contract, which, indeed, could not have been abandoned without materially enlarging the scope of marital influence, and, to the same extent, lessening the protection given to married women, must have had this result. At most, therefore, the enlargement of the equitable jurisdiction for the protection of married women would have the effect of augmenting the proportion in which cases on this branch of the law will come under the cognizance of a Court of Equity. Such cases, anyhow, would not have been wholly removed from the cognizance of Equity to that of Common Law, but would necessarily come partly under the one jurisdiction and partly under the other.

Let us, then, endeavour to ascertain how a body of rights and obligations, now partly legal and partly equitable, would be dealt with upon the assumption of a fusion of Law and Equity. This is no doubt a difficult matter to follow out; and one may reasonably ask for indulgence for some want of clearness and certainty in dealing with considerations so novel and intricate. I assume, however, that the union would be effected in the mode proposed, and which appears to me the right one, namely—by a fusion of tribunals, and by enacting that, when Law and Equity are at variance, the consolidated tribunal should give effect to the equitable doctrine. In this manner the law actually administered would be, as it were, the resultant of the potential action of the now existing courts.

It may at first sight seem that, with the multiplicity of tribunals, and the separation of jurisdiction, the arbitrary distinction between the substantive rules of Law and Equity would also disappear; that, for example, the imperfect and

subordinate proprietary rights now recognised as legal and equitable rights would fade away, and be replaced by a single ownership, with rights regulated, not by the technical niceties of law, but by the substantial requirements of the case. A little consideration, however, and attention to one or two examples, seem to me to show that this view is untenable. It will, of course, be remembered that by our supposition, the object is to preserve unimpaired the substantive rights given by the existing system of Law and Equity, while entrusting the vindication of those rights to one tribunal, having full command over all the remedies now attainable either at Law or in Equity, and, it may be added, acting under a uniform code of procedure.

Take the very common case of land vested at law in trustees having active duties as to management, leasing, &c., but of which the net income belongs to a beneficiary. We now say that the legal estate is in the trustees, but that the beneficiary is entitled in Equity. Now, suppose that the fusion of Law and Equity has been effected, is it not obvious that the trustees must still be recognised as owners in actions against trespassers or against the tenants, while as between them and the beneficiary the fruits of ownership belong to the latter? The interests of the fiduciary and beneficial owner will remain perfectly distinct and capable of assertion according to the circumstances, whether they continue to be called the legal and equitable estates, or, under the altered conditions of the case, are called by other names. I think it probable, however, that as a matter of convenience the old names would be retained.

Now take the yet commoner case of stocks or shares, or policies of assurance vested in trustees, in trust for persons in succession. All the rights and obligations of the trustees and beneficiaries *inter se*, and of each, with regard to third persons, would remain unaltered after the fusion of Law and Equity, and the vast body of equitable law relating to trusts would still have to be administered by the consolidated tribunal.

These examples might be multiplied, and yet more striking examples might be given, in which, unless an alteration is made in the existing substantive law, bare legal estates, the mere creation of technical law, must preserve a notional existence, in order to prevent priority of rights from being disturbed. The inference that I draw is that after a fusion of Law and Equity the scandals arising from a failure of justice, in consequence of the insufficiency of the jurisdiction of the court applied to—from the court being compelled to see only one half of the case, and pronounce its judgment without reference to the other half—from incongruous and discordant systems of procedure—may be got rid of. Complete justice, administered on a survey of the whole case, and preceded by an investigation conducted according to uniform principles in the manner best suited to the circumstances, may proceed from a tribunal whose jurisdiction is bounded only by the law of the land. But as long as substantive rights remain unaltered, the old technical and subtle distinctions on which they are to a great extent founded, and which are interwoven with them to a degree not to be understood without a practical acquaintance with the working of the law, must remain pretty much what they are now. In order to simplify and (as far as may be) abrogate these distinctions, no remedy will be available short of codification.

To return to the Married Women's Property Act, the bearing on that subject of the latter part of these observations is the following. The fusion of Law and Equity will leave untouched the existing mass of substantive law, whether of the kind called Common Law or Equity. The distinctions abounding in both branches of jurisprudence, and even the distinctions between them will not be obliterated, and in fact will statically remain much as before, the main effect of the fusion being felt in what have been called the dynamics of law, that is, in the remedial action of the courts. The equitable doctrines of separate use and restraint on anticipation will still define a modification of

interest applicable to the property of married women only, and the complexity of the body of law applicable to the property of married women will not be increased, nor will the fusion of Law and Equity, in the sense in which it is possible, be impeded, by the large class of cases in which relief is given by the recent Act being brought within this equitable doctrine.

ART. VIII.—NOVATION OF CONTRACT.

WITHIN the course of the last year this phrase has become one of serious import to some thousands of persons. Transactions long ago supposed to have been settled, liabilities long thought to have been escaped, have been revived. We propose briefly to examine the recent decisions on the subject of "Novation of Contract," with the view of suggesting the practical course to be adopted by those affected by them.

The term "novation" is borrowed from the Roman law ("Institutes of Justinian," Lib. III., title 29, s. 3). The learning of the Roman jurists on the question may be found in "Pothier on Obligations."* The word "novation" finds no place in the dictionaries of English law, such as Cowel's "Interpreter," or Tomlins's "Law Dictionary."†

It was used by Sir Roundell Palmer in his argument in the case of *Rolfe v. Flower* ‡ (1866). That, however, was an appeal to the Privy Council from the colony of Victoria; and colonial legislation frequently adopts features of the Roman law, either directly, or through the medium of the Scottish or French law. In that case, though Sir Roundell

* Ed. Evans. Pp. 380-396, n. 546.

† Ed., 1835.

‡ Law Rep., 1 P.C., 27.

Palmer is reported to have incidentally used the term "novation," yet the headline is "Liability of new firm for debts of old."

Though the word is not an English law term, it has been used of late to describe the act by which a creditor discharges his debtor, and accepts another in his place. In the old cases, this is described by the simple expression, "discharge of debtor." This expression is preferable, for although the discharge may be the consequence of the "novation," the real question to be determined is, whether there has been a discharge, not whether there has been a "novation."

The term "novation" seems first to have crept into judicial use in England in the judgment of the lamented Lord Justice Giffard in the case of *Ex parte Gibson** (1869). There "novation of debt" appears in the headline of the report; and counsel are reported to have quoted the word "novation" from the judgment of Lord Justice Wood in the case of *the Commercial Banking Corporation of India and the East*† (1868). No such expression appears, however, in the report of that case; where the headline is "Release of debtor by creditor and substitution of a new debtor."

Since then, however, the cases on the question of discharge of debtors have been usually called "Novation of contract." It has happened that, with the new phrase, a new phase of the old doctrine has been presented. The earlier cases related chiefly to the retirement or accession of partners in an ordinary partnership; the more recent ones arise out of the attempted substitution of one public company for another.

The definition of "novation" by Pothier is, "the substitution of a new debt for an old;" and the particular form of substitution involved in these cases appears to be that defined by him as "delegation." For this the consent

* Law Rep., 4 Ch. App., 662.

† 16 W.R., 958.

of three parties is necessary—the original debtor, the proposed substitute debtor, and the creditor. The doctrine of the English law as to discharge of debtors is the same.

The point at issue, in most of the cases, is whether there is evidence sufficient to prove this assent on the part of the creditor. The creditor may expressly reserve his rights against the original debtor, in which case there is, of course, no discharge (*Bedford v. Deakin*, 1818*). He must have the inducement of a fresh security as the consideration for the release, or there is no discharge (*Lodge v. Dicus*, 1820†).

The acceptance of security from the alleged substitute debtor would of itself be strong evidence that the original debtor was released. “Is it to be endured that he should hold both liable?” said Lord Kenyon, in *Evans v. Drummond* (1801)‡. Whether there has been a discharge is a question of fact for a jury (*Thompson v. Percival*, 1834§). A creditor might retain both rights (*Harris v. Farwell*, 1851.§).

If the creditor, without remark, continues to deal with the new partnership on the footing of the old contract, that is no evidence of an intention to discharge the old partnership from the debt; but if, with knowledge of the change in the partnership, he makes any alteration in the contract (such as a change in the rate of interest), that is evidence of intention to discharge the original debtors, and accept the substitute debtors (*Hart v. Alexander*, 1837¶). “Where a partner retires, and a customer has notice, and continues his dealings, without making any claim on the retired partner, a jury may, from circumstances, presume that the customer agreed to discharge him” (Vice-Chancellor Wigram in *Benson v. Hadfield*, 1844**). “A very little will do to make out an assent by creditors” (Lord Eldon in *Ex parte Williams*, 1817††).

* 2 B. & A., 210.

† 3 B. & A., 611.

‡ 4 Esp., N.P.C., 89.

§ 5 B. & Ad., 925.

§ 15 Beav., 31.

¶ 2 M. & W., 484.

** 5 Beav., 546; on appeal, 4 Hare, 32.

†† Buck, 13.

With regard to ordinary partnerships, these principles have been sustained in a multitude of cases. In the words of Lord Romilly, "the law is clear and distinct; the discharge is a question of fact—it may be express or implied." We proceed to consider the recent application of these principles to attempts by one company to transfer its liabilities to another.

In the several cases under the heading of *The Era Assurance Company*, the point as to the assent of the creditor did not arise, but it is convenient to state the substance of the successive decisions, as bearing on our general question. The Saxon Assurance Company transferred its business and debts to the Era, and among them a debt due to one Williams. Both companies were winding-up in 1860. Williams claimed to be a creditor of the Era for the balance of his debt, and the Era of the Saxon for the sums they had paid him and others since the transfer. Vice-Chancellor Wood disallowed both claims; that of Williams on the ground that the transfer was beyond the powers either of one company or the other, and was invalid from the beginning (2 J. & H., 400); that of the Era on the ground that it was impracticable to replace the companies in the position in which they had stood before the transfer (2 J. & H., 408). Upon appeal by the Era Company to the Lord Justices, this decision was sustained; but the reason given for it was disapproved, and the Lords Justices expressed an opinion that the transfer was within the power of the companies (1 D. J. & S., 29). Upon that decision, Vice-Chancellor Wood reheard the claim of Williams, and (while adhering to his previous opinion) admitted that claim, in deference to the opinion of their lordships (1 H. & M., 672).

The case of *The Commercial Banking Corporation of India and the East* (16 W.R., 958, 1868), already referred to, arose out of a transfer of business to that Company from one with a somewhat similar name. The transferee company had paid the usual dividends on his debt to the creditor's

agent, but it did not appear that the creditor had had any intimation of the transfer. The Lords Justices (Wood and Selwyn) held that he had acquired no rights against the transferee company, and that "there must be distinct knowledge by the creditor of the change, and an acquiescence plain and sufficient after that knowledge has been acquired" to establish a release of the original debtor, and a substitution of the new one.

Ex parte Gibson, already referred to (4 Ch. App., 662, 1869), arose on the transfer of the business of a private firm to a limited liability company. The creditor had expressly repudiated the company, and declared that he dealt with the partners of the old firm as individuals, but had afterwards applied for and obtained a payment of interest from the company. Upon this, the Master of the Rolls admitted him as a creditor of the company. Upon appeal, the order was reversed by the Lord Justices, who were of opinion that the circumstance of the receipt of interest would not control the previous express repudiation of the company as debtors.

The case of the *Family Endowment Society** (January 12, 1870), was an application for winding up a society, constituted under a special Act of Parliament in the year 1836, by which (as usual in such Acts) the Society was not incorporated, but provisions were made to enable it to sue and be sued by representative proprietors. A deed of settlement was executed, containing provision for dissolving the Society, if need were. In 1849, the Society granted an annuity policy to the petitioner, the liability under which was in terms limited to the subscribed capital of the Society.

In 1861, the directors of the Society entered into an agreement with an Assurance Company for transferring the Society's business to it. The proprietors dissolved the Society, in accordance with the provisions of the deed, and ceased to carry on business. The petitioner received his annuity from the transferee company until 1869, when that

* Law Rep., 5 Ch. App., 118.

company was ordered to be wound up, and he thereupon applied for an order to wind up the Family Endowment Society as an unregistered company, under Part VIII. of the Companies Act of 1862.

It was contended, by proprietors in the Society, that his receiving the annuity from the transferee company was sufficient to establish a novation of the debt; but to this it was replied that the transferee company had acted merely as agents to the Society in the payment of the annuities, and that the petitioner had not relinquished his claim on the original contractors.

Lord Hatherley and Lord Justice Giffard affirmed the decision of Vice-Chancellor James, making the order to wind up, holding that the Society (although "dissolved" in 1861), had not been extinguished, and was within the Companies Act of 1862, and that the petitioner was still a creditor of it. No contract with the transferee company had been entered into by him, no remedy against it had been acquired by him, and no knowledge of the terms of the transfer could be imputed to him.

"It would much shake public confidence in dealing with Assurance Companies, and would, therefore, be greatly to the detriment of such companies, no less than to that of their customers, if the court were to hold that a person, having the security of the assets of one company, should be deemed to have discharged these assets, and to have accepted the liability of another company, merely because the second company, possessing the assets of the first, pays to the creditor his growing annuity on the footing of his grant."

In the case of the *National Provincial Life Assurance Society* * (January 28, 1870), this authority was followed as far as regarded an annuitant petitioner. Another petition, however, had been presented by the holder of a policy on life. The business of the original company had been transferred twice over. It was a registered company, under the

* Law Rep., 9 Eq., 306.

Joint Stock Companies' Act of 1844, established in 1851; its business was transferred to the Bank of London Insurance Association in 1856, and with the business of that Association, to the Albert Life Assurance Company in 1858.

After each transfer, the petitioner paid his premiums to the transferee societies, and finally sent in his claim to the Albert Company; it was admitted by them, but before the time fixed for payment that Company was ordered to be wound up. It was contended on his behalf that his payment of premiums was the same thing in principle as the receipt of an annuity; but it was urged for the Society that he ought, if he desired to enforce his contract against the Society, to have satisfied himself before paying them, that the transferee companies were acting as the Society's agents, which was not the case, and that he must seek his remedy against the company to which he had paid the premiums. Vice-Chancellor Malins adopted the latter view—"If the petitioner did not acquiesce in the transfer, it was his duty to say so. There was a novation of contract." The learned judge offered, however, every facility for appeal, if desired.

Another case, having relation to a policy on life, is that of *Ex parte Blood** (29 Jan., 1870). The policy-holder had paid a premium to the transferee company, and obtained an endorsement on the policy by them, accepting the risk under it. Both companies were in course of winding up. It was contended for him that the endorsement did not release the liability of the original company but gave him the additional guarantee of the transferee company. Vice-Chancellor Malins did not accept this view. Remarking—"I do not wonder that Mr. Blood makes every attempt to make these parties liable to him; I should very much rejoice to see it done:"—he decided that in this case also there had been novation, and that a mere guarantee by the transferee company never entered the mind of the applicant.

* Law Rep., 9 Eq., 316.

In re the Merchant's and Tradesman's Assurance Society (Feb. 28, 1870, Law Rep., 9 Eq., 694), was a case of a mutual society, that is, one having no shareholders' capital, but in which the policy-holders reciprocally insure each other, registered under the Joint Stock Companies' Act of 1844.* The deed of settlement provided for the calculation of profits, the sale of the business, and the dissolution of the Society, which was carried into effect in 1858, when the liabilities were transferred to the Bank of London Association. It was sought to wind up the Society under Part VIII. of the Companies' Act of 1862.

Vice-Chancellor James refused the order. The meeting of the Society to transfer its business in 1858 bound all its members. "If there ever was a case of novation (supposing that there originally was a creditor and debtor, which there would not be here), this seems to be the most complete novation that can possibly be conceived."

In re Manchester and London Life Assurance (March 14, 1870; Law Rep., 9 Eq., 643), arose on the transfer in 1862 of its business and assets to the Western Life Assurance Society, the business of which was itself transferred to the Albert Company, in 1865. Vice-Chancellor James granted the order to wind up. The only evidence of notice to the policy-holder was in the form of receipt given him for his premiums. "It is true he went on paying to the Albert, at the place where he was told in the ordinary course of business he ought to pay it. It appears to me monstrous that a person having a contract of this kind is to be told that he has lost his right under the original contract, and must take such remedy as he may get from some other office, because he pays his premiums and takes receipts at the place where he is told to do so." Vice-Chancellor James held that he was not bound by the decision of Vice-Chancellor Malins in the *National Provincial* case, just quoted, to abstain from giving effect to his own opinion.

* Not 1845 as stated in the Report.

In re the Times Life Assurance and Guarantee Company (March 19, 1870. Law Rep. 5 Ch. App., 381), was a case of a company registered (not "incorporated" as stated in the report) under the Joint Stock Companies Act of 1844, with power in its deed to dissolve and wind up. In 1857, the business was transferred and the Company dissolved. Circulars were issued to the policy-holders offering to indorse their policies with the guarantee of the transferee company. The policy in question was not endorsed, but the holder in 1863 accepted a "bonus" upon it, and gave a receipt to the transferee company. Vice-Chancellor James, upon this, refused the order to wind up. The policy-holder was bound by the provisions of the deed of settlement; he had full notice of the transfer; he accepted the position of being a policy-holder of the transferee company.

Upon appeal to Lord Justice Giffard, this decision was confirmed.

The result of these several decisions may be briefly summed up as follows. A "mutual" society may bind all its members by a transfer carried into effect pursuant to the deed of settlement. A "proprietary" company, whose policies contain the usual clause, incorporating the provisions of the deed of settlement, may bind all policy-holders who, having clear and sufficient notice of the transfer, act in such a manner that their assent to it may be presumed; but the mere payment of premiums or receipt of an annuity from the transferee company does not raise a sufficient presumption of assent. According to the head-note in the *Family Endowment* case "although slight evidence is sufficient in the case of ordinary firms to show that a creditor who continues his dealings with incoming partners accepts the new firm as his debtors instead of the old firm, yet strict proof will be required before it is held that a creditor of a company, under a special contract, has accepted the liability of another company with which the first is amalgamated."

Without presuming for one moment to dispute a decision, arrived at with so much care by authorities so high, it may not be improper to remark that the point is an altogether new one; and that it does not appear unreasonable to have expected that, in the case of a public company, whose dealings are matters of notoriety, and are constantly being advertised and discussed, slighter evidence of notice and of assent would have been deemed necessary than in the case of a private firm. It may well be that where A, B, and C being partners, A retires and D comes in, possibly without any change in the style of the partnership, the new partners carrying on the same business in the same way, a discharge of the old firm ought not to be presumed against a creditor; but where a public company openly declares its intention of ceasing to do business, closes its doors, and directs its creditors to go elsewhere for payment, is it not a strange story for the creditor to urge that he did so meekly for a long series of years in ignorance that anything had been going on in which he was concerned?

It is evident that these decisions run in confluence with a current of feeling in the minds of the learned judges who delivered them, that there is a certain hardship in a man being handed over from one company to another without his consent. It may be so; though, in the absence of fraud—assuming equal solvency on the part of both companies, and a proper consideration to have been paid for the risks assumed—it is difficult to see wherein the hardship consists. Is it not a greater hardship that a shareholder, in any of these companies, has undergone, in being chained for so many years to a dead body of liability—from which nothing he could do could release him—the extent of which he could never ascertain?

There is no contract between an Assurance Company and its policyholders, either that the company will continue to carry on business, or that its individual members will con-

tinue to be responsible under the policies.* Every individual member has the right to transfer his shares without the consent of the policy-holder, and (by the operation of the Companies' Act) becomes discharged from all claim at the end of one year from the transfer. In cases where the policy incorporates the clauses of the deed of settlement, and they provide a method of transfer of the whole liabilities, it is difficult to see any distinction in principle between such a transfer, when duly made, and the transfer of the shares of a single shareholder.

No case of the kind has yet been determined with regard to a society possessing no legal organisation whatever, such as those established before 1844, without a special Act or Royal Charter, but it is presumed that, in any such case, no question of "novation" could arise. The contract is made with the trustees of the deed of settlement, and all they have to do is to show that they have complied with the provisions of the deed. The contract remains the same, and the transfer, if made, requires neither "discharge" nor "adoption," the consent to both being made part of the contract itself.

As a result of these decisions, it becomes indispensably necessary that all persons, who were shareholders in any Assurance Company at the time of the transfer of its business to any other company, should take steps to ascertain the extent of their liability, and to obtain a release from it. It seems to us intolerable that, where the shareholders of a company have paid over to persons appearing competent to undertake the risk, the properly-ascertained value of the liability under it, and possess no control over the future management of the transferee company, it should be within the power of policy-holders to sleep upon their rights and their wrongs for any number of years, and only to awake to the fact that something has been done by which they were not bound when the transferee company is insolvent.

* See *Waterloo Assurance Company*, 1864, 33 Beav., 542.

If a release must be obtained from every creditor, it should be obtained forthwith.

In cases where the transferring company has been regularly wound up in pursuance of the Companies' Acts, or the earlier winding up Acts, the contributories have obtained a sufficient release. Where that has not been done, it may be necessary to resuscitate the dormant companies, for the purpose either of effecting a transfer, pursuant to their deeds, of the shares of the members individually, or of entering into voluntary liquidation. Whatever be the means adopted, something should be done in all these cases to put an end to the suspended liability, or to force the creditors to an election. With regard to all future cases of transfer of business, the effect of recent Statutes gives them legislative sanction, and will probably prevent any such questions arising.

By the Companies' Act, 1862, s. 161, any company in voluntary liquidation may accept shares or policies of another company for distribution among its members, or may enter into other arrangements, which will be binding on all its members, unless varied by the court within one year. As far as regards the issue of policies to members, only a Mutual Assurance Society could bind its policy-holders; but, as forming part of a winding up, a proceeding under this section would force the creditors to an election. By s. 162, provision is made for the purchase of the interests of members who dissent. These provisions are now superseded, as far as regards Life Assurance Companies, by the Life Assurance Companies' Act, 1870 (33 & 34 Vict. c. 61). Section 14 provided that the directors of any company under that Act desiring to transfer its business to another may apply to the court for its sanction, which shall not be given where policy-holders representing one-tenth of the amount assured dissent; and no transfer is to take place to which the sanction of the court is not given. By s. 15, copies of all documents relating to the transfer are to be deposited with the Board of Trade.

The Joint Stock Companies' Arrangement Act, 1870 (33 & 34 Vict. c. 104), enables the court (in a winding up) to sanction and make binding on all creditors, or all of any class of creditors, a compromise agreed to by a majority in number, representing three-fourths in value.

ART. IX.—HABITUAL DRUNKENNESS.

By A. HERBERT SAFFORD.

THOUGH habitual drunkenness is a vice which is becoming less frequent, the statement that there some 60,000 habitual drunkards in the United Kingdom was certainly a full and sufficient justification for the production of Dr. Dalrymple's Bill of last session. The medical press had with one voice called for such a measure, and the success of similar legislation in America certainly might have led the promoters of the Habitual Drunkards' Bill to expect a fair and patient consideration. We at once admit that some serious objections to the Bill may exist, but we think that the principle, the erection of asylums for inebriates, is worthy of trial. We cannot therefore assent to the suggestion recently made by the *Times*, that the gentlemen who have advocated this measure, comprising as they do earnest and practical thinkers, eminent medical men, and others who have an accurate knowledge of the amount of misery and crime arising from this offence, may be classed among, in the choice language of the leading daily newspaper, "incurable fools, incurable knaves, incurable scribblers, and incurable talkers." It is to be observed that these names have been hurled at the advocates of the Bill, without any discussions of its objects. The *Times*, having no arguments, and irritated by its loss of position as an oracle, has simply resorted to scolding, in terms of which even a low class criminal attorney

be confined in a licensed reformatory while under the influence of such unsoundness of mind, and for a sufficient length of time afterwards as may be necessary for the protection and more complete restoration of his mind and health. An habitual drunkard may, at his own request, be received into a reformatory, or may be admitted upon the request of a near relation or friend, upon production of certificates signed by two medical practitioners, and upon the affidavit of some credible witness that the drunkard is incapable of managing his affairs, or dangerous. A Justice of the Peace or a Commissioner in Lunacy may order the drunkard to be discharged upon proof that the disorder has been cured. The time of confinement is, however, limited to not less than three months, and not more than twelve. This is an epitome of the first portion of the proposed Act, and in this part is no doubt the greatest difficulty. As Mr. Bruce, the Home Secretary, while expressing sympathy with the object of the Bill, said, "the law does not even compulsorily lay hold of lunatics until they are violent or criminal," and the public at large are not pre-would probably have been ashamed. We think the Bill at the least merits discussion, and shall therefore proceed to consider the principal provisions of Dr. Dalrymple's scheme, the working of a similar plan in New York, and the necessity for the establishment of sanitarium in this country. We believe we shall prove, not only that the detention of drunkards, until they have obtained an opportunity of reformation, is the most merciful course, but also that at the present time persons repeatedly convicted of this offence are liable under existing laws to imprisonment for a lengthened term equal to that proposed for their detention at an asylum for inebriates.

In the Bill before us an habitual drunkard is defined as a person who has rendered himself, by excessive and frequent use of intoxicating drinks, incapable of self-control, or who is dangerous to himself or others, and it is declared he shall be deemed to be of unsound mind. An habitual drunkard may

pared to accept the statement that a person who renders himself incapable of self-control, or dangerous, should be deemed as of unsound mind. Drunkenness has no doubt been defined as a state in which a person is overwhelmed or overpowered with drink, so that his reason is disordered; but if we once permit the drunkard to be dealt with as a lunatic, how can we enforce the maxim of our criminal law that he who is guilty of any crime through his own voluntary drunkenness shall be punished for it as if he had been sober? However much we may pity the drunkard, we cannot forget that the making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others.

The greater portion of the second part of this Bill will, we believe, be received with general approbation, and we much regret that it has been encumbered with the preceding clauses. The magistrates of any county or borough may establish a sanitarium to which they may commit—(1.) Persons proved by medical and other testimony to be habitual drunkards, and incapable of managing their own affairs, or dangerous; (2.) Persons who have been convicted of drunkenness three times within six calendar months. The offenders may be detained for not more than twelve months, but can be discharged on proof of their restoration to mind and health. Some of the principal objections to the Bill have thus been stated in the *Pall Mall Gazette*—

“In considering the provisions of the measure which has been introduced under the name of the Habitual Drunkards’ Act, the first feature which is apparent would be the necessarily enormous increase of the so-called sanitariums, refuges, *maisons de santé*, which would really be only private asylums in disguise. There are even now a considerable number of retreats or sanitariums established for the reception of persons of intemperate habits, as is evident from a very cursory perusal of the advertisement sheets of the medical journals. These places are kept by medical men for the avowed and perfectly legitimate object of profit, and at present they contain only voluntary inmates. How would it be if they were filled

with men and women whose aberrations were rather those of moral than of mental affliction, but who would in all essential particulars be treated as lunatics? What security should we have that the worst abuses of the private asylum system would not be not only in full force, but multiplied fourfold from the circumstance that they would bear on persons actually sane in intellect though faulty in their moral habits? The scheme of allowing per centage for example is one which it can be proved is quite commonly practised. A medical man who owns or superintends an asylum signs the certificate which places an alleged lunatic under the care of another doctor similarly occupied, and receives from the latter a commission of 20 or 25 per cent. on the profits arising from the patient, and the compliment is returned in kind when occasion offers. It can hardly be questioned that this is an inducement of the most direct kind to make these proprietors anxious and active in assisting to stock each other's folds."

No doubt these are difficulties, but they can be met by stringent legislation. We are not, however, interested in defending the provisions of the Bill as regards voluntary patients, or patients sent by friends to the sanitariums; we should be well satisfied to see these omitted in the future measure; but we are anxious to see some more merciful and less primitive means than the stocks used for the reformation of those drunkards who offend against public decency. There are thousands who are now being constantly convicted by the magistrates, whom it would be far more economical to detain in a sanitarium, than to inflict upon the country and the police the annoyance, trouble, and expense of repeated apprehensions and commitments. Several cases in point occur to our mind, but we will take that of a girl who began a course of habitual drunkenness at the early age of seventeen. She herself expresses her anxiety to reform, but the periods to which the magistrates are empowered to sentence her are not sufficiently long to break the vile habit, and are just long enough to restore her to liberty, with an increased desire for that which has been her ruin—drink. The following is a

list of her offences and punishment during a little more than six months in the present year.

February 11, Drunk and incapable, Discharged; February 23, Drunk and disorderly, 7 days; March 11, Drunk and incapable, Discharged; March 15, Drunk and disorderly, 7 days; April 6, Drunk and disorderly, 15s., or 10 days; April 16, Drunk and disorderly, 7 days; May 6, Drunk and disorderly, 40s., or 1 month; June 28, Drunk and disorderly, 5s., or 7 days; June 30, Drunk and disorderly, 7 days; July 7, Drunk and disorderly, 40s., or 1 month; August 6, Drunk and incapable, 5s.; August 26, Drunk and disorderly, 40s., or 1 month.

It will be seen that this unfortunate woman has served three whole months' imprisonment, and nearly six weeks in shorter terms, that is to say, for those offences for which she has been punished, leaving entirely out of consideration those times when, although drunk, she was sufficiently fortunate to elude the police. Yet, although she has suffered so long an imprisonment, she might under existing laws have been sentenced to longer periods for mere drunkenness, unaccompanied by disorderly conduct. The 21st Jac. I. c. 7, s. 3, enacts that any Justice of the Peace—

“Shall from henceforth have power and authority, upon his own view, confession of the party, or proof of one witness upon oath before him, which he by virtue of this Act shall have power to administer, to convict any person of the offence of drunkenness, whereby such person so convicted shall incur the forfeiture of five shillings for every such offence, and the same to be levied, or the offender otherwise punished, as in the said Statute is appointed; and for the second offence he shall become *bound to good behaviour* as if he had been convicted in open sessions; anything in said former Statute made in the fourth year of his majesty's reign to the contrary notwithstanding.”*

Now, the requiring this woman to find sureties would

* Recently at the Richmond Petty Sessions, a man was charged with being drunk and incapable, and as there were previous convictions against him, he was bound over, himself in £20 and two sureties in £10 each, to be of good behaviour for six months. Committed in default.

simply mean her commitment to gaol for a long period; she would not receive proper medical treatment, and the expense of her detention in prison would be equal to that in a sanatorium. Mr. Bruce urged, as an objection to legislation on the subject, that—

“The great safeguard against drunkenness was the growing opinion, that it is a disgraceful habit; but this proposal, instead of taking hold of the young man when some good could be done, only dealt with those on whom the habit had become almost, if not quite, inveterate.”

No doubt a better education among the working classes, the establishment of decent refreshment houses, or working men's clubs, where the man in work can treat his less successful friend to a meal, instead of a pint of beer, will do much to promote sobriety. In fact, we believe that a very large proportion of drunkenness may be traced to the misplaced generosity and courtesy of friends. Many labourers would deem it an insult to offer an unemployed fellow-workman a loaf of bread, and, therefore, beer is their only method of expressing an active sympathy. The majority of men charged with drunkenness at the London police courts are out of work, and attribute their inebriation to this cause. Still, though we hope that, as the disgrace of drunkenness has been gradually admitted among the gentry, who, some years since, were quite as great sinners in this matter as the working classes are now, the same feeling will, with the promotion of decency in their dwellings, and a higher moral tone, extend to the handicraftsmen. Yet we cannot, in the face of the successful experiments in America, consign 60,000 of our fellow citizens to the doom of irreclaimable drunkards—madness and death!

Having in the course of this article repeatedly mentioned the reformatory work which has been done, and is still progressing, in the United States, we think it will not be impertinent to our subject to give a sketch, however im-

perfect, of the working of these sanatoriums. One, the New York State Inebriate Asylum has been established at Binghampton, 1867; another, the Washingtonian Home at Boston, 1867; a third at Media, Philadelphia; and a fourth at Chicago; while in the British province of Nova Scotia great exertions are being made to procure a similar asylum. To the American asylums, by an Act passed in March, 1865—

“Any justice of the Supreme Court, or the county judge of the county in which any inebriate may reside, shall have power to commit such inebriate to the New York State Inebriate Asylum, upon the production and filing of an affidavit or affidavits by two respectable *practising* physicians, and two respectable citizens, freeholders of such county, to the effect that such inebriate is lost to self-control, unable from such inebriation to attend to business, or is thereby dangerous to remain at large; but such commitment shall be only until the examination now provided by law shall have been held, and in no case for a longer period than one year.”

The following may be taken as an illustration of the treatment. A clergyman, for more than two years before entering the Binghampton asylum, drank a quart of brandy daily, and felt sure that he would die if he should suddenly cease. He entered the office at 11 a.m., after having drunk twelve glasses of brandy, and intended to return to his hotel to enjoy a last, quiet debauch, but Dr. Day (the superintendent) quietly objected to his return, sent for his trunk, and cut off his brandy at once and totally. For forty-eight hours there was incessant craving for his accustomed stimulant, and he could only obtain sleep by the assistance of bromide of potassium, but on the third day the craving ceased, and he *never felt* it again. Other patients have stated that they suffered a morbid craving for the first two or three weeks; but all agreed that the sudden discontinuance of the stimulant gave them less inconvenience than they had anticipated. Complete recovery is, of course, a slow and long effort of nature, but the improvement in the health, feelings, and

appearance of patients after only a month's residence upon that briery hill is very remarkable. The success of the treatment at this asylum is most satisfactory. In the year 1866, 349 cases were admitted, of whom there returned for the second time 34, for the third time 18, for the fourth time 6, and for the fifth time 2. There are now doing well, and apparently reformed, 215, while 65 are greatly improved, and 9 are incurable, and unfit to be at large. The average number of days which each patient remained was only 27.

Dr. Day states :—

“Since my connection with the Home (about nine years) there have been registered as admitted to its care the names of 2300 patients. Of this number 410 have suffered from the various forms of mania known under the general name of delirium tremens. Twenty-seven inmates of the Home have died during this time, a large proportion of those deaths being caused by consumption, pneumonia, and other diseases, aggravated by intemperance. Of course it is impossible to estimate with any degree of accuracy the proportion of this number who have been completely reformed. Many are dead and hundreds are scattered all over the country, or have passed from under my observation, but it is safe to say that a majority have remained firm to their determination formed while with us, while a much larger proportion have had their condition alleviated, with hopes of eventual and permanent cure.”

It is evident from the above statement that in a very large proportion of cases the patients have been cured, or are in a fair way of recovery. As a matter of economy, surely such a system is worth a trial, when the average detention is only equal to that for which a prisoner for drunken and riotous conduct might be sentenced. Great stress has, however, in some quarters been made upon the suggestion that the eminent political economist, Mr. John Stuart Mill, is opposed to punishment for drunkenness. True it is that in his essay on Liberty he writes :—

“Drunkenness, for example, in ordinary cases, is not a fit subject for legislative interference, but I should deem it perfectly legitimate

that a person, who had once been convicted of any act of violence to others, under the influence of drink, should be placed under *special legal restriction*, personal to himself, and that if he were afterwards found drunk, he should be liable to a penalty, and that if when in that state he committed another offence, the punishment to which he would be liable for that other offence should be increased in severity."

But he also admits that:—

"Whenever, in short, there is a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law."

We think these quotations will prove that Mr. Mill is not in favour of non-interference with the habitual drunkard. The objections often offered, that habitual drunkenness cannot be defined, and that a power to restrain drunkards might be abused for evil ends, have thus been disposed of in the *Lancet*: —

"We think these objections might be met by making drunkenness in the first place, and then habitual drunkenness, offences of which the criminal law should take prompt cognizance—at present intoxication is regarded by the administrators of the law as a venial error, and is punished, if at all, by the infliction of a trifling fine. Now, if it were enacted that any second summary conviction for drunkenness before a magistrate should be followed by a short term of imprisonment with hard labour, and if the police were instructed to prosecute offenders, a great step would at once be gained. The fact of drunkenness would be branded as criminal and disgraceful in a way which has never yet been done, and the punishment would have a powerful deterrent effect upon many. It would then be perfectly possible to provide that, after a certain number of summary convictions, the offender should be tried before a jury for habitual drunkenness, and sentenced, if found guilty, to a period of detention in a special reformatory. Such proceedings would afford complete protection against improper imprisonment, and we believe that public opinion is, or will soon become, fully ripe for them."

To these suggestions we give our cordial concurrence. We are not among those who advocate the prohibition of the sale of liquors. The failure of such laws in Connecticut, Massachusetts, and New Hampshire, should be a sufficient warning to the advocates of similar measures in this country. People will not stop selling, buying, and drinking intoxicating liquors because the Legislature says they must not. On the other hand, we will not subscribe to the doctrine of the *Times*, that because there have been, and are, therefore there must be, a large number of habitual drunkards. The fatalist cry of Kismet to all propositions for ameliorating the social condition of the working classes by the repression of some of the evils which more especially attack them will not be ours. We see daily homes, happy families, ruined and made miserable from drink. We hear of men who have enjoyed the highest reputation accused of, or yielding to, crimes with which they never would have been charged, but from this unhappy propensity to habitual drunkenness. The statement of the leading daily paper, that "there are not a few who would willingly get drunk every Sunday and Monday if they could be assured of being sent to an asylum and reformed during the week," seems to us an insult to the common-sense of the English public. In spite of sneers at philanthropists, and wholesale abuse, without argument, we believe that the day is not far distant when the Habitual Drunkards' Bill will, with some amendments, become law. Even while we are writing comes before us a disgraceful account of the habitual drunkenness of "respectable" married women at Birmingham, whose gross antics were hailed by a crowd of English men and women not with shame and contempt, but with delight. If the punishment of drunkards by this Bill had no further effect than to educate the minds of the lower orders in a feeling of horror for this most fearful vice, the labours of Dr. Dalrymple and the medical profession will be amply rewarded.

ART. X.—THE LATE PROFESSOR VON VANGEROW.

THE students of Roman jurisprudence in Great Britain and the United States of America will learn with deep and unfeigned regret of the demise of Professor Adolf Carl von Vangerow, of the University of Heidelberg. Within the last few years the old Ruprecht University has suffered irreparable losses in the removal by death of Mittermaier, Rothe, and Von Vangerow. Not only were these professors great scholars, but they were preëminently gentle and good men. As a criminal lawyer, upon whom Professor Feuerbach, of Bavaria, cast his mantle, no man has, perhaps, ever obtained to so high a position as Mittermaier. His countenance was stamped with benignity, and his life furnishes an example of what a man should aim at who is desirous of being a true patriot and a friend of the human race. Rothe was a model theologian. His quiet calmness, his unaffected piety, and his beaming countenance, transfused almost with celestial ardour, when delivering certain parts of his lectures on the "*Leben Jesu*," can never be forgotten by those who have been his pupils, and enjoyed his friendship. But Von Vangerow was a strong man; strong in frame and muscle, and one can scarcely believe that he has passed away years before attaining the allotted span of human life. As one looks at the accumulated memoranda obtained at his lectures, and remembers that his allotted two hours daily for lectures on the Pandects were sometimes extended to upwards of three, one cannot but feel that the life of the great man has been shortened through the waste occasioned by the enormous physical energy consumed in his inimitable addresses.

The successful German professor is a despot, but his despotism is of the divine type, for he sways his sceptre in the domain of intellect by the force of his inflexible purpose, and his superior mental power. As one has often quietly walked

by the side of Von Vangerow, in the old Plöckstrasse in Heidelberg, receiving his friendly, kindly greeting, one easily realized that he was a strong man in every sense, but no one would have guessed from his appearance that such hidden fires of eloquence lay smouldering beneath that quiet and repose. But it was so, for Von Vangerow was a man of a lion-like nature, and all his movements were like the tramp of a Titan. Mittermaier was, in his lectures, colloquial, fragmentary, suggestive, lacking system and completion; Rothe was chaste, finished, and exquisite; but Von Vangerow had a power of utterance and of eloquence, with a voice like the tone of a trumpet and the melody of a harp, that no other professor we have ever heard possessed. This is no exaggeration, as those who have known the lamented German will admit. There is a marked distinction between a German professor, of the first rank, and many public teachers in our own country. The German, impressed by his theme, and dominated by his subject, gives you the result of his craft in a finished and carefully planned piece of workmanship. The very "chips from the workshop" of such a man are valuable. The Englishman too often forgets that he is an investigator; he speaks as if he knew everything, and as though it were an act of condescension to treat upon the subject he has in hand. Such men could never occupy the first rank in a German University. The *genius loci* requires something different, and the professor can only hope to obtain success when he is natural in his manner, and when he is himself so interested in his subject as to command the lively interest of others.

But to return to Von Vangerow. He was born in the South of Germany, at Shiffelbach, a village in Kurhessen, not far from Marburg. In the beautiful country where Luther met and contended with Zuinglius, he spent his youthful days. The current conviction with his Heidelberg students used to be that he was not particularly industrious in his early life; and it was even hinted that he was once

plucked. However this may have been, it is certain that from his sixteenth year, now nearly half a century, he has devoted his noble energies to the study of jurisprudence. On January 23, 1830, he was advanced to the degree of Doctor of the Civil and the Canon Law, and the following Easter he commenced his professional career as Privat-docent in the University of Marburg. It is not a little remarkable that Savigny, Puchta, and Von Vangerow, were at different times associated with the Hessian University of Marburg. Savigny commenced his student life there in 1795, and took his Doctor's degree in the same legal school on October 31, 1800. Puchta was a professor at Marburg in 1837, and Von Vangerow was for ten years identified with this seat of learning, as student, tutor, and professor. He was appointed Professor extra-ordinarius at Marburg in the year 1833; in 1837 he was appointed in the same University, Ordinary Professor, that is, one of the principal Professors of the Law. Upon the death of the distinguished Professor Thibaut, in the autumn of 1840, just thirty years ago, Von Vangerow was invited to the University of Heidelberg, where he remained, till his lamented death, the most popular Professor of the Roman Law in Germany.

In Germany it is usual to mark distinguished literary and scientific ability by Court favour. Thus, two years after Von Vangerow's settlement at Heidelberg he was appointed a Court Councillor in the Grand Duchy of Baden; in 1846 he was made a Privy Court Councillor; and in 1849 he became a "*Geheimrath*" or Privy Councillor in the same State. He was a knight of both German and Russian orders.

No man's writings could possibly give less idea of his flowing and rich eloquence in his class than those of Von Vangerow. In this country a man writes a lecture, polishes it, and touches it up, not for the benefit of his class, for they may doze or scribble while he is delivering it, but because he has the publication of a book in view. It is quite different in Germany. There is no compulsion to attend

lectures, no register of attendance is kept, and hence the student's life is the freest period of a young man's course. The student may wander about with his dogs, or he may spend his time by bawling songs from his "*Commerz Buch*" in his club, or fighting duels on the far side of the Neckar. If he is to be won and rivetted to his class it must be by the power and eloquence of the professor. It is a remarkable fact that with all this freedom men sometimes "*hospitiren*" to learn what is going on in other classes, but they rarely forsake their own favourite professors. The secret of a German professor's popularity is not merely to be traced to his great stores of learning, but to the unfettered use he learns to make of his voice.

Goethe himself, a prince among writers, has said—"To write is to abuse speech, and perusal is but a sad substitute for the living energy of language." But Von Vangerow himself shall be heard upon this point, as it will explain his own marvellous success. He has said:—

"I hold it to be an essential requirement of lectures on the modern Roman law that the verbal discussions of the lecturer should not only comprehend in a fragmentary manner the general distinct parts of the law, but should present for the contemplation of the auditors the entire system as an organic whole. Of course, I here presume a free and characteristic delivery, one in which the professor is, at the time of his lecture, really self-active. Lectures that are dictated or read ought, in common justice, never to be given, for they are only destructive to the intellect of the professor, tending to convert his avocation into actual misery, whilst they lack the penetrative vitality which give to a spoken lecture its real value."

Such men as Savigny, Puchta, and Von Vangerow, would never have obtained their world-wide reputation if they had confined themselves to the *ipsissima verba* of their MSS. The ready utterance, the keen, quick eye, kindly glancing at the student and ascertaining at once whether the statement was understood; the courteous demeanour and sympathy of these great men, all brought to a focus, powerfully ministered to the advancement of their students, and to their own well-deserved

European fame. Powerful and fascinating as were the addresses of Von Vangerow, he was a true and faithful disciple of the school of Savigny. Not only did he talk of the original sources of the law, but he constantly led his students to refresh and stimulate their research at the fountain head. The great revival in the study of jurisprudence that the present century has witnessed in Germany, has been the result of the careful and loyal study of the sources of the law, contained in the "*Corpus Juris Civilis*" and the other writings of the jurists and scholars of antiquity.

Von Vangerow's inaugural address, delivered at Marburg in 1830, consisted of a commentary on l. 22 Cod. "*De jure deliberandi*" (6·30). This address was succeeded by the following works:—A treatise upon the "*Latini Juniani*," Marburg, 1833; "*De Furto Concepto ex Lege XII. Tabularum*," Heidelberg, 1845; his great work entitled "*Leitfaden für Pandektenvorlesungen*,"—elementary work for lectures on the modern civil law—was first published at Marburg in three volumes, in 1837, and the following years. This work has passed through several editions; the seventh was published only last year. Almost his last work was a monogram on the difficult questions connected with the *Senatus Consultum Neronianum*. Von Vangerow has also written in Richter's "*Jahrbuch*" several critical works, and in the "*Archives for Civil Practice*," of which he has been co-editor since 1841, a great number of articles have appeared from his pen.

In contrasting the three great civilians of Germany of modern times, it may be observed that Puchta was a compact and philosophical writer, who, if he had lived at the time of the early Roman jurists, when the luminaries of legal science were grouped in two constellations of surpassing brightness, would have been found marshalled with the Proculians, the sect or school that treated the law with philosophical freedom, deriving its arguments from the appropriateness and the utility of the law itself. Arndts, for-

merly of Vienna, is preëminently a plain, able, and practical writer. But Von Vangerow possessed a critical acumen that amounted to genius. His arguments are so striking and cogent, he is so fair to his opponents, combining the clear common sense of the best English controversialists with the learning and acuteness of a German.

The Pandekten of our great master is a work upon the modern Roman law altogether unique. To the general student it would be regarded as lacking the completeness and finish of Puchta. To the advanced student, Von Vangerow presents, in his extracts from the authorities and his discussions on the controverted points of the law, a mine of wealth and treasure, not to be found in any modern treatise on the Roman law. In his three volumes, containing almost as many thousand pages, we possess the most acute discussions on the controversies of the Roman law, found in either ancient or modern writers. These volumes, however, give no adequate conception, to a mere reader, of his well rounded and perfectly spoken lectures. His works resemble a vast workshop stored with materials, and containing things in various stages of completeness. Their great value can be only appreciated by those who have used them as text-books for his spoken lectures. During the winter session of the University of Heidelberg, for five months of the year, hundreds of students flocked to his class. They came from all parts of Germany, from France, Holland, Belgium, England, Italy, Spain, Greece, Russia, and the United States of America. Full and systematic, microscopically correct and accurate in his authorities and his definitions, his students never wearied of listening to him, and even grew enthusiastic in their devotedness to the professor, and to the branch of the law of which he was so great a master. In his lectures there seemed to be revived the fluency, the beauty and promptness of the great Roman jurist, Ulpianus.

One of the best informed of our daily journals recently printed the following able, truthful, and pertinent remarks on the great jurist.

"While French journalists have been circulating fictitious stories about the mysterious death of an illustrious German officer, one of the most noteworthy among German professors has suddenly passed away. By the death, in his sixty-second year, of Professor Vangerow, at Heidelberg, Germany loses one of her greatest jurists; and the students of Roman law one of their most accomplished teachers. Since Savigny died, Professor Vangerow has had no superior in the world as an authority upon Roman law. For the last twenty years his lectures have attracted students to Heidelberg from all parts of the globe. In his class-room, students from every State in Germany, from England, Scotland, and America, attentively listened to the exposition of the principles of Roman law, and to an explanation of the points which had been the subjects of controversy and doubt. There was not a pamphlet relating to the law which the professor had not read, and to which, in his work entitled 'Pandecten,' he did not make some reference. He had the gift, possessed by few of his countrymen, of being exhaustive without being exhausting. His lucidity of exposition was as great as his learning. This contributed to make him renowned as a teacher. Indeed his fame as a writer is out of proportion to his capacity. Had he devoted himself, like Savigny, to the production of some comprehensive work on Roman law he would doubtless have made a greater mark in the voluminous literature of which Roman jurisprudence is the theme. He might have done this, however, without rendering a more important service to the students of jurisprudence. Those who profited by his teaching will be able to accomplish that which he had not the time to undertake."

We hope and believe that the closing words of this writer may be verified in the future.

Many years ago Mr. Chittenden, of the American Bar, was sitting by the side of the writer of this sketch at the close of Von Vangerow's course of lectures on the Pandects. All the class were in a state of exhaustion; but it was felt to be exhaustion after a mighty victory. Never will the plaudits with which those lectures were concluded be forgotten. Mr. Chittenden retired with the writer, to the building now known as the "Hotel de Russe," and whilst the present writer was writing an article on Lord Palmerston for the *American*

Press, Mr. Chittenden wrote on a piece of paper, still preserved, the following account of that closing lecture. "Dr. Von Vangerow was deeply affected, for his students had faithfully clung to him till his last utterance. His face was flushed and his glorious voice trembled with feeling. When he closed, thunders of applause testified the admiration of his students, and many a tear was brushed away from manly cheeks. 'Gentlemen,' said Von Vangerow, 'we have attained our object, and I have now only a pleasant duty to perform. Though during the long months that have fled, I have given your patience a severe trial, I still hope that the recollection of the labour my instructions have cost you, will not cast too deep a shade upon the lectures themselves. You will, I know, remember that the labour has been mutual. I am confident that the investigations of the past session have demonstrated to you, that the study of the Pandects is, and will be, the only sure basis of a scientific knowledge of the law. I am quite sure that your further researches in jurisprudence will be facilitated by the attention you have paid to this subject. One who knew well has said, and said correctly, "*bonus pandectista, bonus jurista*," and the experience of every age confirms the assertion. I trust you will regard the notes of my lectures, which you will carry away with you, as a friendly souvenir of the past session. But my time fails; I thank you heartily for your kind and studious attention. It is a guarantee to me that you have acquired a correct idea of the full significance of the principles and doctrines advanced. I shall not, however, blame you,' he pleasantly observed, 'if you rejoice somewhat at the thought, that—instead of listening to the voice that has so long resounded in this lecture hall,—you are about to enjoy a pleasant *ferien* in the homes of your friends. Farewell.'" Several have been the communications since that "Farewell," which have come from the kind-hearted and noble professor on the banks of the Neckar to the old student on the banks of the Thames. On the 18th of October last, a letter came with the

Baden impress. It told his former pupil and friend that the excellent professor, Dr. Von Vangerow was dead, and that on the previous Friday he had been laid in his last resting-place—his “quiet bed,” as the Germans call it, not far from Umbreit, and Mittermaier, and Rothe, and that a distinguished professor from Munich had been already invited to occupy his chair.

ART. XI.—THE LEGAL EDUCATION ASSOCIATION.

ON the 6th of July last, just before the beginning of the long vacation, a movement was formally organised in Lincoln's Inn Hall, which promises to effect a complete revolution in the study of jurisprudence in England. Surrounded by a large number of lawyers, representing both branches of the profession, supported by the law officers of the Crown, and by leading men of all shades of opinion in politics, Sir Roundell Palmer, the most eminent and most respected member of the English Bar, proposed a resolution constituting the Legal Education Association, of which he was subsequently made president. This resolution, which was seconded by the Solicitor-General, supported by leading attorneys, and put to the meeting by the Attorney-General, was unanimously carried. It sanctioned what had already been done by the promoters of the Association, who, beginning as a small committee of provincial solicitors, had, by their patient and unremitting exertions, gradually made the profession and the public supporters of their scheme; and it adopted the short and simple statement of the objects they had placed at the head of their circular.

Although every leading daily and weekly paper, and almost every leading periodical, has expressed unqualified approval

of those objects, it has naturally happened that the writers of some of the longer articles in dealing with the subject of legal education have discussed other questions which affect the practice and the status of the profession. It is due to the Association to remind our readers that it has carefully limited its functions to the work of creating a proper system of legal education. "Its views," as Sir Roundell Palmer said in his address, "were carefully guarded so far as pledging themselves to these two objects only, namely, first 'the establishment of a Law University for the education of students intended for the profession of the law,' and secondly, 'the placing of the admission to both branches of the profession on the basis of a combined test of collegiate education and examination by a public board of examiners.'" Whether the present strict line of demarcation which separates the practice of one from the practice of the other branch of the profession should be retained, and, if not, whether it should be removed altogether or only partially, are questions which have nothing to do with an organisation intended to give both branches a better kind of education; except so far as that better education will enable both branches to discuss all questions affecting their common profession in a broader and more intelligent spirit. The business of providing effective machinery for teaching the science of law and testing the results of such teaching, stands before everything in "the process of law reform." The establishment of an efficient law school would, as the circular of the Association very properly observes, "be the best preparation for a reform of the law itself." For all the defects in our positive law, the unsystematic creation of new rules, both judicial and legislative, the useless and bewildering treatises which crowd our bookshelves, the empirical practice of our courts, which justifies Mr. Justice Hannen's severe comparison of the successful lawyer with the skilful "bone-setter," are entirely due to the shameful neglect with which the science of jurisprudence has been treated in this country. Those, therefore, who have at heart

the highest interests of the profession, will most worthily serve it by helping to place it in its proper position as a science. The best methods of applying it as an art may be safely left to be adjusted by the common sense of the public and the profession.

The prominent and important position which the Association has now reached has only been attained after more than two years of incessant, though comparatively private, effort. At every step they took, the Committee were met by difficulties of all kinds, some of which, as we shall presently see, are still to be dealt with. Up to the time of the meeting, at which the Association was formally constituted, their scheme was discredited by absurd rumours, that the whole profession was to be revolutionised, that the two branches were to be amalgamated, that the Hon. Societies of the Inns of Court were to be abolished, and their property confiscated, and so on. These rumours were effectually silenced by Sir Roundell Palmer's able and convincing address. There was to be no revolution, professional or otherwise; they proposed no fusion of the two branches. "That institution (the future law school or University) was not to deal with anything but legal education, and the tests to be provided, so far as they contemplated anything, contemplated the existence of distinctions between the two branches of the profession." So far from proposing the abolition of the Hon. Societies of the Inns of Court, the Association "did not presume to dictate to the Inns of Court in any way whatever with respect to their internal organisation or government. If they were to have a legal University, he (Sir R. Palmer) would like to see his own College (Lincoln's Inn) incorporated with it as one of its Colleges; but that was for the Inns of Court themselves to determine."

One of the most significant and gratifying circumstances attending the movement has been the general and cordial support which has been given to it by the leading men belonging to, or in any way connected with, the profession. For

the first time, we believe, in the history of any agitation for legal reform, a large number of the judges have not only expressed approval of this scheme, but have authorised the public announcement of their approval in the circular of the Association, whilst others, without authorising their names to be published, have expressed opinions in favour of the movement. Eminent ex-judges have written to say that the proposed scheme has their hearty well-wishes. The Attorney- and Solicitor-General have joined the Council of the Association, amongst the members of which will be found most of our leading barristers, side by side with members of the chief firms of solicitors in London and all the principal provincial towns. Then, again, in still more curious juxtaposition with the professional lawyers, we find the Universities of Oxford, Cambridge, and London, represented by men of eminence as jurists and teachers; Oxford, by its Regius Professor of Civil Law, Dr. Bryce; its Corpus Professor of Jurisprudence, Dr. Maine; its Chichele Professor of International Law, Dr. Bernard; and its Vinerian Reader of Law, Mr. Kenelm Digby; Cambridge, by its Regius Professor of Court Law, Dr. Abdy; London University, by the Professor of Jurisprudence at University College, Dr. Amos.

The explanation of this is to be found in the fact that the Committee have dealt with the subject of legal education in no narrow, professional, or local spirit. They have felt that they can only accomplish the object they have before them—that, namely, of rescuing the science of law from the degradation into which it has fallen—by extending the facilities for its study in every direction. Acting in this broad and catholic spirit, they have boldly and successfully defied the bigoted exclusiveness which would keep the education of the solicitor jealously apart from that of the barrister, and have persuaded leading men in both branches to combine for the purpose of obtaining so far as practicable a common education. How far such a common education is practicable is a matter of detail, which will have to be worked

out further on. Enough for the present that a common purpose has united both branches in a sensible and cordial alliance.

Moreover, the promoters of the movement have wisely declined to be controlled by any merely local influences or traditions. It is true they have assumed that London will be the educational centre of the new system, that there must be a metropolitan school of law, with its staff of teachers and board of examiners. But this, as Mr. Grant Duff long since pointed out, is a local necessity. The Universities can never, under the most favourable circumstances, do more for the ordinary student intended for the pursuit of a profession, than train him for the acquisition of special professional knowledge. "What the Universities have mainly done—what I found the University did for me," said Carlyle, himself the most distinguished student of the University, whose students he was addressing, "was that it taught me to read in various languages and various sciences, and for the rest, in regard to all your studies here" (at Edinburgh), "and whatever you may learn, you must remember that the object is not particular knowledge that you are going to get higher in technical perfection, and that sort of thing."* The final and special professional school must be where the professional practice goes on, and where the professional training may be best had. Whatever changes may be effected in the direction of localising our procedure, the most important legal work of the country will always come to London. There also the ability and experience of both branches of the profession will always be mainly found; for there the higher professional prizes must always be sought. It would be idle therefore to talk of creating the new educational machinery anywhere else than in London. At the same time the promoters of the movement have made it clearly understood, that every encouragement will be afforded to the study of jurisprudence in its purely scientific aspect, not only at the older Univer-

* Address as Lord Rector to the students of Edinburgh University.

sities, but wherever opportunities for promoting the study offer. Hence it is that the professors and readers whose names we have given have joined the council of the Association, and expressed their intention of giving it their assistance, without, of course, committing themselves to any details. The relations which the Association has already succeeded in establishing with the Societies, hitherto more or less representing both branches of the profession, make us hope that one of the most difficult and delicate parts of its task, that of obtaining the co-operation of existing vested interests, is almost accomplished. The course which it has taken, has been at the same time decided and conciliatory. In its preliminary statement no doubt was left as to the scope of its action;—the establishment of a law University or school in London, a complete and thorough system of legal education, and a satisfactory method for testing the results of such education. In plain language the Inns of Court and the Incorporated Law Society were informed that neither could supply this want. But, anxious to use the words of its president, “to do nothing and say nothing which might in any way whatever throw difficulties in the way of those who could help them in forwarding the cause,” the Committee, both in its printed statement and its private communications with all of the Societies, earnestly drew attention to the fact that they might afford invaluable help by taking part in the organization which would be required. In this way it has appealed directly and impressively to the good sense and right feeling of the Benchers, and the appeal has been answered in a way which has taken a large section of the profession and the outside public by surprise. Before the long vacation the Middle Temple, “in a manner quite worthy of the zeal which it has at all times exhibited in the cause of Legal Education, had responded most generously, and had not only appointed a committee to communicate with the Council of the Association and with the committees of the other Inns of Court, but had *recorded its approval of the views of the Association.*

Gray's Inn had not gone quite so far, though it had substantially done the same thing. It had appointed a committee with power to communicate with their Council and with the committees of the other Inns of Court, with a view to the promotion of the same object. Lincoln's Inn had not thought it expedient at present to go so far, but he " (Sir Roundell Palmer) " hoped and believed that it was only because they desired to move gradually, and to see their way before going further." * Indeed, as the speaker whom we have just quoted observed, " the fact that they were met there that day to organize the Association and appoint its council might, if other reasons were wanting, justify their hesitation, and their resolve to wait for a future day before communicating with them."

Though a majority of the members of its council have formed the Council of the Association, the Incorporated Law Society have not up to this time signified in their corporate capacity their formal decision to co-operate with the Association, but stated in their reply to the invitation of the Association that " they considered they ought not, as representing so large a proportion of the practising attorneys and solicitors, to express their approval of the objects of the Association, without ascertaining as far as practicable the views and opinions of the profession." Since this resolution was passed, nearly four months have elapsed. We trust that when the Association enters upon the second and most important part of its mission, it will find this Society, which has so faithfully discharged its duty as the pioneer of Legal Education, accepting, on behalf of the other branch of the profession, a new position and larger duties, and that it will become part of the new organization. It is right to add that the Metropolitan and Provincial Law Association and the leading provincial law societies have passed resolutions, declaring the objects of the Association " worthy of all who take an interest in the welfare of the profession."

* Address of Sir R. Palmer, in Lincoln's Inn Hall.

As we have already observed, the most difficult and delicate part of the work which the Association has taken in hand still remains to be done. It is much to have obtained a general and hearty recognition of the soundness of the principle on which the movement is based. But to embody that principle in a harmonious and efficient organization will task the patience, the tact, and the energy of the Executive Committee of the Council to which the duty has been entrusted. The manner in which this Committee has been selected shows clearly that one of the most formidable of their difficulties, that, namely, of making the scheme meet the views and needs of all the interests involved in it, has been realised and provided for. The Inns of Court, the Incorporated Law Society, the Universities, are all represented by men who best know what is wanted in their respective directions, and where they can and ought to make concessions. In the hope that we may afford them some slight assistance in their arduous labours, we venture to make the following suggestions with respect to the future work of the Association.

In the first place, proposals for narrowing the scope of the scheme will be made on all sides by obstructive, or timid, or crotchety advisers. These proposals must be rejected without hesitation. If the promoters of the present agitation have judged rightly in the matter, the time has come for a comprehensive reform, and the public mind is prepared for it. To ask, therefore, for some petty instalment, some piece of tentative machinery, or some clumsy adaptation of existing machinery would be sheer folly. Any such makeshift would be sure to prove unworkable, would discredit the movement, and postpone all real reform indefinitely. Then, again, the Committee must be prepared for endless minute objections to the details of their scheme, whatever shape it may ultimately take. As an illustration of what we mean we will take the observations of Sir George Young, in the paper read by him before the Juridical Society in May last. The tone of

that paper reflects the highest credit upon the writer. He approves without any reserve of the general objects which the Association aims at achieving—the improvement, namely, of the official provisions for imparting legal instruction, and the substitution of an examination for the present system under which access is had to the profession. He welcomes the idea of concentrating the educational provisions for both branches of the profession into one school of law. Comparing the scheme of the Association with that proposed by the Royal Commission of 1854, he even goes so far as to say, that “altogether the difference between them may be said to amount to this, that this scheme will work whilst that of the Commission will not.” But though Sir George Young is quite free from the narrow prejudices which have hitherto obstructed all reform, he is not free from a certain academic narrowness, which prevents him from dealing with a practical question in a broad, practical, common-sense way. The term “university” attached to the proposed educational organization, jars upon his too critical and sensitive ear. It is no doubt, strictly speaking, an obvious misnomer, and not the less so, because, as Sir George Young tells us, Sir Edward Coke so described the Inns of Court in a rhetorical flourish, or because the Commission of 1854 tried by an equivocal confusion to defend the use of the word on etymological grounds. But the use of the word in this instance can do no harm, for it can lead to no misconception. No father who articles his son, or enters him at one of the Inns, would ever be misled by it into the notion that the “Law University of London” was going to give the youth a general as well as a professional education. “There is something attractive,” as Sir George Young naïvely admits, in the name of a University, and we doubt whether the inaccuracy of the term would strike many even of the Cambridge fellows. It certainly did not occur to Mr. Lowe—no mean authority on academical education—for we find him speaking of the Inns of Court as “a University in a state of decay.”

The objection urged by the same writer to the giving of the professional degrees of Associate and Bachelor of Laws has more practical force, though, as regards the degree of Bachelor of Laws, he quite misunderstands the value of what he calls a "real" as compared with a professional degree. If the new system of legal education and examination is thoroughly carried out, a degree in law granted to the student for the Bar would necessarily represent some special professional knowledge, over and above the very moderate general education of the passman, and over and above any theoretical knowledge of jurisprudence acquired from the University law teachers. We are disposed, however, to agree with Sir George Young in thinking that the distinction implied in these degrees would not be worth the machinery required for conferring them as mere pass degrees. But it should be borne in mind that of late years the profession of an attorney has undergone a marked change, both in its character and position. The interests dealt with have greatly increased in complexity and importance, and it has become quite clear that no man can be an efficient general practitioner in law—an adviser upon whom clients can rely—unless he has received, not only a general education quite equal to that received by the candidate for a Master's degree at either Oxford or Cambridge, but a special knowledge of the principles of law, which neither of those Universities can, on their own admission, afford. This fact, coupled with the fact that the average professional income of attorneys is far higher than that of barristers, has naturally attracted the educated good sense of the country, and many of the younger members of this branch are graduates of Oxford, Cambridge, or London. But, whilst in London and our larger provincial towns there is plenty of business of a character which requires men of considerable education to do it properly, there is, throughout the country, a kind of practice which can be done by inferior men—men who can only enter the profession at all through a very moderate

pass examination. It is, we think, scarcely fair that every one who becomes an attorney should be confined to this low test of fitness; and it has been urged on their behalf, that if they concur in a common and comprehensive scheme of education, those students who, after presenting themselves for the higher examination which would qualify them for a call to the Bar, decide to become attorneys, should carry into their practice as attorneys some mark of their having passed this higher examination.

But all these points are merely matters of detail, and are given merely as instances of the criticisms which must be expected. It is when Sir George Young comes to deal with the method of organization that he shows how possible it is for able and earnest men to imperil the very reform which they advocate, through inability to look at a question except from one stand-point. Starting with the proposition that "the needs of candidates tend to call into existence the teaching which they require," he seriously proposes that the Association shall confine itself in the first instance to creating this demand for good teachers by creating a proper examining body; and he adopts as a model the Civil Service Commission. "Get an efficient body," he says, "to set the examinations," and the good teachers will answer to the demand for good teaching, which will be immediately created. But what would the Incorporated Law Society—what would the Inns of Court say, to a proposal for superseding them and their functions by a board of a similar character to the Civil Service Commission? We do not hesitate to say that these bodies would withdraw at once from all co-operation with the Association if it confined itself to such an attempt, and that the public, regarding the Association as a failure, would see it collapse without a single protest.

Here we have a striking instance of a proposal for piecemeal or tentative reform, which should not be entertained for a moment. Even if the ground were clear, we think that such a puny attempt to create a great educational machinery

would fail signally. It is quite true that the Inns of Court are not Colleges, and probably can never be converted into Colleges. It is quite true that, in the strict sense of the word, no school of law in London can afford collegiate education. It is quite true that the ordinary articled clerk of to-day, set to work in the office at seventeen, and only spending one year of his time in London, has not the same advantages of general education as the graduate who leaves the University at twenty-two to enter at the Temple ; that the special professional teaching which suits the one will therefore fall short of that required by the other, and that the examination must be adjusted in each case to different standards. But if this teaching is to be afforded, and these examinations are to be held in London, if both branches of the profession are to unite for this purpose, if public opinion is to be brought to bear effectually on the whole question in Parliament and elsewhere, and existing organizations are to be pressed into the service, the Association must not listen to any suggestions for any curtailment of their scheme. That section of the governing body in each Inn which regards all change as an evil will, when they find some change inevitable, propose to compound for the minimum of change. They will offer to appoint an additional reader, or to cancel that rule recognising a year's reading, or rather attendance in chambers, as a sufficient qualification for a call, with which they paralysed the attempt made in 1852 to create something like a school of law. To all such proposals we hope the Association will reply by stating that their duty is to provide a thorough system of legal education and examination, and, by applying to the Crown for a charter, incorporating a University or School of Law.

The suggested heads of this charter have already been issued for consideration, and though, when it comes to be drawn up, modification will no doubt be found necessary, we believe that it substantially embodies the real

requirements of the profession. It proposes to vest the Government in a senate, which is to be constituted as follows. The Lord Chancellor, the Chief Justice, and the Attorney and Solicitor-General, are to be *ex-officio* members. The Crown is to have the power of appointing a certain number of nominees, who will no doubt be men of eminence. A similar power of nominating members is to be given to each of the three Universities of Oxford, Cambridge, and London, so that the schools of law in each may be properly represented, and help, as well as share, in the reorganization of legal education. A certain number of members are to be elected by the benchers and a certain number by the barristers of each Inn. The Incorporated Law Society, the Metropolitan and Provincial Law Society, and Provincial Incorporated Law Societies, are also to appoint a certain number of nominees. In this way every vested interest affected by the proposed charter will be represented in the governing body. Of course, a senate thus elected is open to the objection that it is too mixed and too large a body to be efficient. No doubt it would be better, if it were practicable, that it were composed exclusively of efficient working men. But in order to create such a body, all the conditions must be disregarded which must be observed by the promoters, if this movement is to succeed, while, on the other hand, it will be possible by judicious arrangement to render this apparently unwieldy body thoroughly efficient.

The Association is about to lay the foundation of a national law school, which will not only meet professional need, but afford to the general public opportunities for the study of jurisprudence. That these foundations should have long ago been laid by the Inns of Court is clear; but it was as judicious as it was in good taste, to offer them an opportunity of associating themselves with the movement. For, though the Association carefully disclaims the intention of in any way dealing with the funds of these Societies, and proposes to meet its expenses by students' fees alone, its

scope and usefulness would of course be largely increased if it were assisted by the large endowments of these Societies. It is notorious that the benchers of each Inn are divided into two parties, one opposing all change, the other—which is daily growing in numbers and influence—strongly in favour of applying their funds to educational purposes. As soon, then, as the Inns of Court accept the invitation of the Association, as we hope and believe they will, the obstructive party will not be able to resist much longer the combined influence of the progressive party within their respective bodies, and the outside pressure of professional and public opinion. We may, therefore, reasonably expect that when the scheme of the Association has been matured and accepted by the profession and the country, the conciliatory course it has adopted with respect to these vested interests will bring about the restoration of a great endowment to its legitimate object. That the Incorporated Law Society should be asked to become part of an organization which absorbs, in order to enlarge, the functions they have so well performed, is an act of simple justice. And it is only fair that, if the other branch of the profession is to be associated with the movement, its members, both in London and the provinces, should be properly represented. At the same time, it must be admitted that a purely professional governing body could not be expected to deal with the subject of legal education in a way which would completely meet existing wants. Though mutual concessions would probably reconcile any differences arising from the distinction between the two branches, a certain narrowness of tone would inevitably be displayed by a senate composed exclusively of barristers and attorneys. We are glad therefore to find that this evil has been met by the introduction of an important lay and academic element into the constitution of the governing body. The Crown, in making its appointments will, no doubt, select laymen of distinction wherever they can be found, and the representatives of the Univer-

sities will be men whose culture and experience as teachers will correct any tendency to make the school a mere school for practitioners. The Association has shown its wise determination to associate the law teaching of the Universities with its own, by providing in the suggested heads, that "every person who has obtained a degree in arts at any of the Universities of the United Kingdom shall be exempted from the necessity for passing any preliminary examination, and by giving the Senate power to relieve any person, who has satisfactorily passed an examination in law at any such University, from the necessity of passing the intermediate examination, and to shorten his course of study in London."

Although the Association expressly states in its circular that it is not pledged to any details, it will be clear to our readers that the sketch it has drawn up has been the result of much careful consideration. We think that it contains the outline of a scheme which, with some modification, will fulfil the purpose for which the Association has been formed. Without attempting to destroy any existing institution, it proposes to bring together and unite, forces already in operation, in a harmonious and consistent organisation. That it may prosper in its mission must be the wish of every Englishman who thinks that the study and the practice of our law should not remain a reproach amongst civilised nations. For, to quote the words of their circular, "it is only by means of the establishment of some such Law College or University as is here proposed, and the succession of teachers and writers which it would ensure, that we can hope to see arise in this country a School of Jurisprudence, worthy to be placed side by side with the great schools of France and Germany."

DIGEST OF SCOTCH DECISIONS ON GENERAL POINTS OF LAW.

No. 1. 25 Nov., 1868.—*Murray v. Eglinton Iron Company*.—
41 *Jurist*, 93.

LEASE—REPARATION.

A LEASE by the proprietor of a mansion house, whereby a mineral tenant was entitled to sink a pit in a field, and to have access to the field from the road to the mansion house. *Held* the tenant had use of the road only so far as not inconsistent with its use as the approach to the mansion house, and, therefore, iron rails ordered to be removed, and damages found due; but no damage allowed for injury to house or garden from smoke and vapour. Per Lord President (Inglis)—“I cannot imagine that it was in the contemplation of parties that the tenants were to have the exclusive use of the road, leaving the lessor without an approach to the house.”

No. 2. 27 Nov., 1868.—*Hamilton v. Emslee*—41 *Jurist*, 98.

AGENT'S LIABILITY.

A CREDITOR was found liable in damages for an illegal because an excessive pointing (distrain) of his debtor's effects. The excess was intended to cover the landlord's preferable claim for rent. The creditor thereon brought an action of relief against his agent, who was assolizied. Per Lord Deas—“A law agent accepting employment does not guarantee that the advice which he gives, or the opinion he expresses, to his client shall turn out to be sound or correct. As things stand, it is no doubt necessary for a client to take care whom he consults, and it is not an unwholesome result that caution should be necessary in that matter. On considerations of that kind the law, I apprehend, is quite fixed, that in giving his advice in ordinary circumstances, the law agent sufficiently discharges his duty if he gives that advice according to the best of his judgment, subject to this qualification only, that if his opinion and advice be so grossly erroneous as to be altogether inexcusable in any man pretending to be capable of exercising the profession, he shall be held liable for the result.” Lord Kinloch (the Ordinary) had held the agent liable.

No. 3. 2 Dec., 1868.—*McNiven v. Charlton*—41 *Jurist*, 104.

PARTNERSHIP.

A PARTNERSHIP and a lease of the company's premises terminated

at same time. *Held*, that one of the partners could not renew the lease in his own name without communicating with his partner, who was entitled to participate in the subsequent profits. *Per* Justice Clerk (Patton). "It appears to me perfectly plain that a partner, and especially a managing partner, who goes to the landlord, and, behind the back of his partner, obtains a new lease of the partnership premises, is not entitled to retain the profits of that lease for himself. It follows, as the natural result of the plainest principles of equity applied to such a case, that a partner so acting must communicate the benefit of the lease so obtained to the co-partner, the interests of which he was bound to have attended to. The effect of refusing the remedy would be that a valuable interest in the co-partnership—that of good will—would be destroyed, and a private benefit secured by an act grossly wrong in itself."

No. 4. 9th Dec., 1868.—*Watson v. Wilson*.—41 *Jurist*, 124.

OBLIGATION—REAL BURDEN.

A DISPOSITION was granted of part of an estate binding the disponent to a certain style of building, and which obligation the disponent bound himself to insert in all the dispositions of other portions of the same estate. The disponent built according to the plan, and now applied to prevent the disponent disposing of other portions of the estate without imposing the same burden on the disponents. *Held*, the disponent had right to enforce the obligation. *Per* Lord Neaves—"If an owner in making a feuing arrangement, inserts in his conveyances a clause like this, the object of which is to secure the respectability of the neighbourhood, he is clearly bound by it. The feuar must be held to have accepted the conveyance and built his house on the faith of the superior's obligation, and he has therefore a *jus quasitum* in the condition, and is entitled to say that the superior shall not violate it. It is conceivable, however, that cases may arise in which the enforcement of his right by the feuar might be ruinous and oppressive, as not being calculated to protect any legitimate interest on his part, and where accordingly this Court, under its equitable powers, might be induced to relax or modify the superior's obligation. For example, it may, at some time or other, be most expedient for all concerned that a church, or other public edifice, should be erected on some part of this considerable estate, or that some part of the ground should be permanently left vacant."

No. 5. 5 Jan., 1869.—*Clark v. Clark*.—41 *Jurist*, 198.

BILL—BANKRUPTCY.

A BANKRUPT obtained his discharge on a composition under the Sequestration Statute. His brother ranked on a bill and concurred in the discharge. Afterwards the bankrupt, of his own will, granted his brother a bill for the original debt. The acceptor disputed its validity as granted without value and as a preference. The Court, on the authority of the law as laid down by Lord Mansfield,

in *Hawks v. Saunders* (1 Cowp. 290), held the bill good. Per Lord Benholme—"In one sense it is true that the debt had been extinguished by the bankrupt's discharge; for it then ceased to be legally exigible. And there still remained, after the discharge, a moral obligation incumbent on the suspender, and that obligation will be recognised by law if it has been recognised and acted on by the debtor in it."

No. 6. 12 Jan., 1869.—*Drummond v. Winter*.—41 *Jurist*, 203.

LEASE—ACCIDENTAL FIRE.

A LANDLORD let a shop for five years; but in consequence of an accidental fire, the tenant could not get possession until a fortnight after the term. *Held*, that the tenant was entitled to abandon the lease. The authority referred to was 3 July, 1815, *Walker v. Bayne*, House of Lords, 3 Dow, 233.

No. 7. 14 Jan., 1869.—*Paul and Thain v. Royal Bank of Scotland*.—41 *Jurist*, 209.

BANKER—RETENTION.

Held, that bankers were not entitled to retain cash deposited on open account to meet a current bill discounted by them, no special agreement being alleged, or statement that the customer was *vergeus ad inopiam*. Per Lord Ormidale—"It is established as a general rule that in ordinary circumstances, such as occur in the present case, a party is not entitled to withhold payment of a debt presently due by him in security of an acknowledged debt that possibly may become due to him at some future time. I am of opinion that the bank had at the date no right to retain the balance due by them in the deposit account, or to refuse payment of the cheque for that balance."

No. 8. 19 Jan., 1869.—*Strickland & Co. v. Nalson and McIntosh*.—41 *Jurist*, 215.

CHARTER-PARTY—RE-EXCHANGE.

A VESSEL was chartered by the plaintiffs from the defenders to proceed to two foreign ports. At the first port the crew mutinied and were discharged. The captain agreed with the agents for the charterers to deviate from the charter-party, and the latter agreed to advance money to send on the passengers and cargo to the second port. The captain drew bills on the owners for the advances as "necessary disbursements." The owners refused to honour the bills, and an action being brought thereon—*Held*, 1st, that the deviation from the charter-party not being necessary for the safety of the ship, was *ultra vires* of the captain, and the expenses, therefore, not recoverable; and, 2nd, that the owners were not liable for re-exchange, the captain having exceeded his authority in granting bills. Per Lord Barcaple—"It is well settled law that, except in special cases, the captain

alone has power to act for the owners as to the disposal of the ship, and that in order to authorise him to deviate from the voyage agreed on in the charter-party, there must be a case of necessity. A prospect of advantage will not justify such a proceeding. There must be an over-ruling necessity, arising either from it being impossible to carry out the original voyage, or from the certainty of great loss accruing to the owners in the event of the voyage being persisted in." "The claim of re-exchange is an unusual one in our Courts, and I know of no case in which effect has been given to it in our Courts. At the same time it is a well-known claim among merchants, which is recognised by the Courts in England, and to which we must give effect where it properly arises. It admittedly arises at the instance of an indorsee against an indorser upon a bill being dishonoured. It has been decided, however, that there is no claim of this kind against acceptors on refusal to accept—for this reason, that supposing the drawees declined to accept without good ground, the claim of the payees against *them* could only be for the amount of the bills which they were bound to accept and pay and legal interest, any claim for re-exchange being against the drawers, who alone guaranteed that the bills would be honoured."

No. 9. 20 Jan., 1869.—*Cameron v. Morrison*—41 *Jurist*, 223.

BILL—WHEN ISSUED.

A BILL was sent by two acceptors to the drawer with the sum in figures at the upper corner—the words, "four months after date"—the names and addresses of the acceptors and their signatures. The drawer filled up the remainder of the bill and dated it. Summary diligence was sought to be suspended because issued without a date. The Court repelled the objection, and *held* the bill was not issued until filled up by the drawer. Per Lord President (Inglis)—"What is the issuing of a bill? It appears to me that it cannot take place before the bill has become a competent obligation; in other words, before it has become a bill and been issued as such." Per Lord Deas (dis.)—"The view I take of the matter is, that a bill is issued in the sense of the enactment when it passes, as this bill did, out of the hands of the obligor into the hands of the obligee—out of the hands of the debtor into the hands of the creditor, so that the grantor has no longer any power over it. At that time, undoubtedly, this bill was blank in the date."

No. 10. 22 Jan., 1869.—*City of Glasgow Union Railway Company v. Hunter*—41 *Jurist*, 229.

RAILWAY COMPENSATION.

A JURY awarded compensation for value of property taken, and for damage to remaining property by noise, &c. The Company sought to set aside the verdict as contrary to the Statute on several grounds, as to the mode the jury computed value. The Court assailed.

Per Lord President (Ingليس)—“In my opinion it makes no difference whether the injury to be ascertained arises directly from the execution of works on the portion of land taken, or less directly from the execution of the works on land taken from a neighbour.” “I entirely agree with Lord Wulbury that the words ‘injuriously affecting,’ in this and other similar Statutes, do not mean ‘wrongfully’ or ‘unlawfully,’ but are used in a popular sense as meaning deterioration in value. We are not entitled to meddle with the verdict of the jury unless they have done something plainly illegal. It may be quite clear that the jury have not taken the best way of getting at the value of this property. But I cannot say that what they did was incompetent or illegal.”

No. 11. 26 Jan., 1869.—*Paterson v. Taylor*.—41 *Jurist*, 223.

PROPERTY BOUNDARY.

A PARTY obtained a conveyance of a piece of ground bounded by the central line of a proposed street, measuring forty feet in width. *Held* the proprietor was entitled to build up to that line. Per Lord President (Ingليس)—“The question is whether there is a contract to leave space for a street of forty feet width between the respective properties.” “To constitute such an obligation, where the right of property extends to the centre of the space proposed for a street, there must be an express stipulation in the titles.”

No. 12. 26 Jan., 1869.—*McKenzie v. City of Glasgow Union Railway Company*.—41 *Jurist*, 233.

PROPERTY—SURRENDER.

THE proprietors on one side of a street were all taken bound to leave “a lane or passage of ten feet in breadth along the back of their properties.” *Held* that one of their number was not entitled to erect an arch over the lane, to connect his property with another he had acquired on the opposite side. Per Lord Justice Clerk (Patton)—“The law of servitude is inapplicable, the right being of the nature of a common interest in the lane; and if we look to what was the intention of the parties, I cannot but think that an open lane or narrow street, and not an arched passage, was intended. I may observe also that if one proprietor was entitled to arch over his portion, every proprietor would have the same right. The result would be that this lane would present a series of arches and open spaces, which would very much affect the use and enjoyment of the privilege intended to be secured.”

H. B.

Notices of New Books.

[* * It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

Systems of Land Tenure in various Countries. A Series of Essays published under the sanction of the Cobden Club. Second Edition. London: Macmillan & Co. 1870.

THIS work appeared very opportunely—at the very time when legislators, publicists, and literary men were all turning their thoughts to the extraordinary position of the Irish Land Question; and when the Government was making up its mind to settle that great question for one generation at least. If there was a subject on which the British public was, two years since, specially ignorant, it was that very land question. The apparent paradox involved in the statement that the laws affecting the land in England and Ireland being alike, the systems arising out of those laws were, and must continue, essentially different, was bewildering. Much light was thrown upon a dark topic by Mr. Gladstone's speech on the introduction of his great measure. It remained that the various land systems of Europe should be presented, for examination and comparison, in the present volume, which may be described as a series of essays which, while containing much legal and much statistical information, deal rather with the sociological and political aspects of the subject.

As the case of Ireland was, at the beginning of the present year, present to all men's thoughts, it was natural that the essay upon Ireland, by Dr. Longfield, should head the list. The "Nationalist" writers will gain little aid to their cause from this acute observer. He points out that the agricultural wealth of Ireland is rapidly increasing; that absenteeism is far less injurious than it was a century since, and is, in fact, diminishing; that homicide and outrage exist because they are natural or indigenous habits, and not because of agrarian, and, therefore, of removable, inciting causes. The Ulster Tenant Right (to which the new Act imparts all the force of law) is "not capable of being exactly defined," and it "is not without its disadvantages." In reference to the "improvements" which have been said by many to be attributable to the industry and outlay of the tenantry, Dr. Longfield states that only a small fraction of the present value of the land is to be attributed to these alleged improvements by tenants. Unquestionably few persons living have enjoyed better opportunities of becoming acquainted with the details of this vexed

question. It may, therefore, be concluded that Parliamentary orators, like Mr. Maguire and Sir J. Gray, who made out, or endeavoured to make out, a very different case while engaged in discussing the Land Act, were, in fact, highly colouring their case, while urging excessive demands for far more than they were ever likely to get. The difficulty of gaining accurate intelligence on the simplest questions of fact in Ireland, is well illustrated by these conflicting statements as to tenants' improvements. "Fixity of tenure," so vigorously demanded by the advocates of the tenant party, is shown to be utterly opposed to reason and justice, in one of the most forcible and logical divisions of Dr. Longfield's essay; and a watchword so discredited can hardly now be revived with any effect for years to come, and will never be revived with hope of success until the powerful land-owning element in the Legislature shall have been eliminated.

One passage of Dr. Longfield's elaborate paper appears open to exception in a remarkable degree. It will be remembered that under special Acts of Parliament the incumbered estates were sold off, and conveyed to purchasers. One of the commissioners for doing this was Dr. Longfield, who must have executed some thousands of "Parliamentary" conveyances, all of which by virtue of the Act cleared the land conveyed from all estates, interests, claims, and demands whatever—excepting those specified. The purchaser had, therefore, the strongest guarantee which it is in the power of the Legislature to give, against all pre-existing rights. And yet we are told that there would be no injustice in a recognition and allowance of claims for improvements made antecedently. Suppose a horse sold under process by the sheriff, and made over to the highest bidder, who pays the full value, and fancies that he becomes absolutely the owner of an unincumbered steed. Would he tolerate any pecuniary claim on the part of some ostler or farrier who had "improved" the animal long prior to the day of its judicial sale? Equally unjust is a claim for "improvements" put forward against a purchaser with "Parliamentary title," who was, in fact, induced to buy by the ostensibly final and conclusive nature of the transaction. That so monstrous a proposition should be so supported is strange indeed. For "reasons of State" the golden sovereign might be declared to be worth fifteen shillings, or the penny postage stamp might be rendered value for three farthings. But the last person in the world to recommend such a proceeding ought to be in the one case the ex-master of the Mint who had issued, or in the other, the ex-secretary of the Post Office who had sold, to the public the depreciated commodity. If a contract must as a method of pacification be repudiated, the official who on the part of the public signed that contract comes forward with a bad grace to justify the repudiation.

The essay on the landed system of England, by Mr. Wren Hoskyns, is too brief, yet long enough to show the author's acute perception of the causes which render land the luxury of the few, rather than the heritage of the many. If he could persuade the English nation to take a genuine interest in a question which must

affect the future stability of the kingdom, and if he could induce the legal profession to co-operate in the preparation and successful working out of a good system of registering titles, and thereby of facilitating the acquisition and transfer of land, he would be a public benefactor. Mr. Campbell contributes to the volume a careful sketch of the complicated land system of India. M. de Laveleye, in describing the systems prevalent in Belgium and Holland, enters, as we think judiciously, more minutely into statistical statement than the other essayists. When, however, he estimates the mortgages existing in England at 58 per cent. of the value of the land, he manifestly adopts some very crude statement which it would be utterly impossible to verify. There is no discernible method of arriving at the percentage of incumbance. If mere guesswork were allowable, M. de Laveleye's guess might be pronounced to be three times too high. There are, as we are informed, statistics in Ireland tending to show that the incumbrances on land, instead of 58, do not amount to 18 per cent. of the value. It appears that in Belgium the tenants hold, for the most part, under leases too short to admit of full justice being done to the soil; and that transfers of land are burdened with an enormous duty of more than 6 per cent. of the value. Notwithstanding these drawbacks, Belgian agriculture is marvellously successful, and strongly supports the argument for subdivision of ownership, and perfect mechanical ease in effecting land transfer. The closing passage of M. de Laveleye (p. 28r) especially deserves to be quoted:—"There are no measures more conservative, or more conducive to the maintenance of order in society, than those which facilitate the acquirement of property in land by those who cultivate it."

The conclusions to be arrived at in the case of Belgium agree with those stated in the case of France by other writers. Again, we find that the cultivation by small farmers is not inferior to that by large farmers; and, again, we are a little startled at the fact, that the tax on land transfer amounts, even in France, to 6 per cent. Probably one effect of the war will be the utter ruin of very many small farmers, and the absorption of their little properties by more wealthy neighbours, who are enabled to tide over the calamities of the German invasion. Space does not allow of any reference to the cases of Germany or Russia, although the great reforms of Stein and Hardenburg ought not to be passed over without notice. Hereafter no one can claim to any extensive knowledge of the land-system of Europe who has not mastered the contents of the Cobden Club volume of Essays.

The Landlord and Tenant (Ireland) Act, 1870, with Introduction, Notes, Index, &c.; Edited by W. G. Brooke, M.A., Barrister-at-law. Second Edition, Revised. Dublin: Hodges & Co. 1870.

THE Irish Land Act must in the nature of things be very frequently referred to by the legal advisers of the numerous persons who have inherited, or acquired, landed property in Ireland. For the assist-

ance of such, and indeed of all other persons connected with Irish land, there has been published, in Dublin, under the editorship of Mr. Brooke, a very compact, clear, and concise little volume, which contains the Act itself, explanatory notes on the sections, and a very elaborate index. The notes to those sections which define the rights of agricultural tenants to compensation in the event of their being ejected, and which ensure them a recompense for improvements made by them on their farms, are especially valuable. Without such a guide it will be difficult even for a professional reader of the first portion of the Act fully to comprehend its drift and purport. The preface states that the notes to Part II. of the Act (that intended to facilitate the purchase of their holdings by occupying tenants) have been furnished by Mr. Denny Urlin, whose long official employment, under the Incumbered and Landed Estates Acts, has rendered him familiar with all points arising out of land transfer. It must be remembered that any landlord in Ireland, although tenant for life only, is now enabled, with the approval of the court, to sell the fee simple of the land to the occupying tenant. This volume is exactly what it purports to be—an annotated edition of the Act. It abstains from reference to the "Cromwellian confiscation," the "Devon Commission," and all other historical reminiscences, and is in the highest degree terse and practical. It only remains to say that the first edition of this carefully edited little work was exhausted in less than a month; and that the very slight amount of alteration made in the second edition testifies to the industry and care bestowed, in the first instance, on the preparation of a valuable addition to the list of "legal handy books."

A Treatise on the Law of Bankruptcy, containing a full Exposition of the Principles and Practice of the Law, including the Alterations made by the Bankruptcy Act, 1869, with an Appendix comprising the Statutes, Rules, Orders, and Forms. By George Young Robson, Esq. London: Butterworths, 7, Fleet Street. 1870.

THIS work must not be ranked with the many handbooks to the new Act, which have been issued from the press during the last eighteen months. It is, as its title asserts, a treatise on the Law of Bankruptcy. It is not a mere annotated edition of the Act of 1869. The treatise itself occupies 568 pages. Then follow the Bankruptcy Act, 1869, the Bankruptcy Repeal and Insolvent Court Act, 1869, the Debtor's Act, 1869, portions of the Act for the Abolition of Fines and Recoveries, 3 & 4 Will. IV. c. 74, bringing the pages down to 624. The general rules and the bankruptcy forms come next, and a very copious index completes the volume. The time has arrived when the law of bankruptcy may be scientifically treated as a distinct and separate branch of the law. The tendency hitherto has been to regard it as a collection of arbitrary rules without method.

or principle. On this account we are glad to welcome the form of Mr. Robson's book. Instead of following the orthodox plan of giving us the sections of the Act with notes in microscopic type, in which are collected, with an infinite expenditure of labour, extracts from every case bearing directly or remotely on the subject, we have here a distinct attempt to discover the principles in accordance with which the law has been built. This method has peculiar advantages to recommend it to the practitioner. It gives him a grasp of his subject with which no mere summary of cases and text will supply him. It is the method, we venture to say, which will distinguish the new school of trained lawyers from those who have gone by, and whose appeal was invariably to precedent rather than principle. But it is to the student to whom a book, dealing with the subject in this form, is peculiarly valuable. The study of the law in the old method required infinite industry, but little brain. The new will require more thought, with less mere cramming of cases.

Mr. Robson has usefully, as it appears to us, sketched the history of the various doctrines and usages connected with bankruptcy. Here, again, we think that his design is right. The interpretation of our law, in any of its departments, can hardly be understood without reference to its growth.

Into the subject of the law of bankruptcy, which is treated of fully in a former page, we do not propose to enter here. Our object is simply to point out that Mr. Robson has furnished a well-written and carefully-planned book. The industry manifest in the collection of cases is quite as great as works which, for all practical purposes, do nothing else. We have great pleasure in giving it the warmest recommendation to our readers.

The Law of Commerce in Time of War, with particular Reference to the Respective Rights and Duties of Belligerents and Neutrals.

By Edward James Castle, of the Inner Temple, Barrister-at-Law.

London : William Maxwell. 1870.

THE unhappy war between France and Prussia is an inland rather than a naval war. No court of prize has as yet been erected, or called into existence in either country. Of captures there have been very few, and therefore not many questions of Maritime International Law have arisen likely to perplex the general community of our traders and shipowners; and the need of the work before us is scarcely as great as it would have been during the American or Crimean war. Nevertheless, it is well to have the different branches of the law of nations affecting trade and navigation clearly before us, and Mr. Castle has performed his task with admirable clearness and ability, though we cannot say with sufficient completeness. A loan is now being negotiated in this country by a belligerent power, and we would have expected to find in the work all the cases in point, showing how far it is to be considered a breach of neutrality. The question of the export of contraband is one of great difficulty,

and though the expediency of prohibition or permission is a political, rather than a legal argument, all the precedents bearing on the conduct of neutral States, with reference thereto, would have been useful. And the Foreign Enlistment Act, with its new provisions as regards the building of ships of war, might have been more fully explained. Questions of this character would have been more important for present interest than questions relating to licences. On the whole, however, the law relating to the rights of neutrals, rights of search, law of blockade, &c., is well stated, and the work is likely to be very useful at the present moment.

The Elementary Education Act (1870), with Introduction, Notes, and Index. With an Appendix, containing the Provisions of the Revised Code with regard to Grants for the Building of Schools, the Schools Sites Act, &c. By Hugh Owen, jun. London: Knight, 90, Fleet Street. 1870.

THERE ought to be a large demand just now for the Elementary Education Act, but we can testify from experience that this Act is not by any means easy to understand. The terrific handling it received in both Houses of Parliament has not made it peculiarly symmetrical. Whatever may be its merits, clearness of arrangement and *elegantia* do not rank among them. Probably this is inevitable when the work has passed through so many hands. Any help, therefore, by means of references from one part to another, or by means of notes, will save those who wish to become school-board representatives, and the many other readers who will have to become acquainted with the Act, a good deal of trouble. The best praise we can give Mr. Owen's book is, that its carefully prepared index, its full notes, and convenient size, will make it much more convenient, and its facts much more accessible, than is the Act as printed by the Parliamentary printers.

Chronological Table of and Index to the Indian Statute Book, from the year 1834, with a General Introduction to the Statute Law of India. By C. D. Field, M.A., LL.D., late Registrar of the Calcutta High Court. London: Butterworths. 1870.

THIS is a very useful work, similar in most respects to the Chronological Table of and Index to the Statutes of Great Britain, lately published by authority of Her Majesty's Government. The similarity is, however, as it appears, undesigned, and there is this important point of difference between the two works, that Mr. Field's book is the production of a private individual, and possesses no official sanction. It is, however, a valuable addition to the legal literature of India, and will prove extremely useful to any one desiring to investigate a point of Indian Law. The Indian Statute Law is of a very complicated character, a circumstance which renders the services

of such a guide as the work before us peculiarly valuable. The book consists of two distinct parts—the Table of Statutes and the Index. The first of these is arranged in parallel columns, showing at a glance the year and number of each Statute, the subject with which it deals, and the manner in which it has been affected by subsequent legislation, if any, on the same subject. Repealed Statutes are included in the Tables, but are distinguished by italics.

The second part of the work, *i.e.*, the Index to the Statutes, appears to be clear and accurate. It is hardly in our judgment sufficiently full, but it is only fair to say that it appears to be quite as full as the Index of English Statutes lately published by order of Government. An Introduction is prefixed to the work, giving a brief account of the origin and classification of Indian Statute Law. This part of the work is calculated to be of much service to all students of Indian law, as an explanatory sketch of the subject before them. The necessity of such an explanation is shown by the circumstance that there are no less than twenty-one different classes of laws prevailing in different parts of British India, and that these twenty-one different classes of laws have been made by eight different authorities. After such a statement we cannot do better than recommend every one who contemplates a plunge into the labyrinth to seek the guidance which Mr. Field's book is calculated to supply.

Humanity and Humanitarianism. By William Tallack. London : F. B. Kitto, 5, Bishopsgate Street. 1870.

MR. TALLACK's views, with reference to penal treatment and the prevention of crime, must always command respect. Indefatigable in his self-imposed task, that of bringing the English nation to condemn capital punishment both as barbarous and useless, he has touched and adorned the discussions upon reformatory treatment. The pamphlet before us urges, *inter alia*, that petty offenders should be confined a sufficiently long time to work out their own reformation and cost by industrial work, but at the same time cautions us against the system lately adopted in the United States of making the condition of a prisoner a luxury, and rendering his career safe, profitable, and even agreeable. The writer calls attention to the former almost perfect system of gaol discipline in Philadelphia, and laments its retrogression. Most justly does he deprecate the extreme severity of some English magistrates, but we should be glad to know under what law a man has been punished for trapping a fox. The remarks upon insanity are worthy of careful attention, and we gladly see that the principle of making parents of criminal children pecuniarily responsible for the cost of their maintenance in reformatories is warmly advocated. We concur with many of the writer's strictures upon capital punishment, and may give as an illustration of the alleged deterrent effect that within a few days of Mary Waters having been hung a woman attacks another, threatening that she will be the next to be hung at Horsemonger Lane. The observations upon prison labour and discipline merit consideration, and we would ask why

are military men, who have had the least previous experience of criminals and their habits, generally selected to deal with them. It seems somewhat absurd that these gentlemen are usually appointed governors of gaols and chief constables, frequently after long service abroad, and nearly always without any special qualifications for their post, beyond an alleged knowledge of discipline, a science not difficult of acquirement or involving any high mental education. We commend Mr. Tallack's treatise to all interested in the repression of crime.

The Criminal Law Consolidation Acts, with Notes of the Cases decided on their construction. By Edward W. Cox, S.L., Recorder of Portsmouth, and Thomas William Saunders, Esq., Barrister-at-Law, Recorder of Bath. Third Edition. London: *Law Times Office*. 1870.

VERY seldom in so small a work do we find the contributions of so many eminent writers upon the subjects treated of. The principles of punishment, the Forfeiture for Felonies' Act and the Habitual Criminals' Act are carefully considered by Mr. Serjeant Cox, the able Deputy Assistant-Judge of the Middlesex Sessions. Mr. Greaves, Q.C., clearly explains the law of arrest without a warrant, while a very useful table of crimes and their punishments has been specially compiled for this publication by Mr. Purcell. In the necessarily small compass of this notice it is almost impossible to do justice to the book before us. The single subject of the principles of punishment is one of much difficulty. As the Lord Chancellor, in a recent debate in the House of Lords, argued, "How are you to gauge the feelings of those who are called upon to act?" Admitting this, Mr. Serjeant Cox asks, "But is it practicable to frame anything in the nature of *principles* for the guidance of the judgment in the meting out of punishments? I have put the question to many judges, who have had more experience than myself, and I have found their opinions to differ widely. Some declared the framing of rules to be difficult, and the adoption of them impossible; others pronounce positively against the practicability of either making or acting upon rules; a few have expressed belief that rules might be found, or at least some guiding principles discovered. But all are of one mind in admitting that such a work would be of the utmost value, if only it could be executed with even partial success." In the hope that the design may not altogether be impossible, Mr. Serjeant Cox has devoted his attention to the matter in an essay, which will be read by all magistrates with much interest. We do not, however, attach so much weight, as the writer evidently does, to the suggestion that meetings of magistrates, held periodically, would be of service in procuring greater unanimity in sentences. We believe it has already been tried by one body of stipendiary magistrates, and has not been so successful as it apparently deserves.

The commentary on the law of forfeiture for felony constitutes an important portion of this work, and we entirely concur, it is much to be regretted that in the recent Statute opportunity was not taken to give the power of compensation and payment of expenses in cases of fraud, assault, and, in fact, in all offences attended with injury to the person or property of another, without reference to the ideal distinction between felony and misdemeanour. In the law of arrest without warrant, Mr. Greaves, the learned framer of the Consolidated Acts, gives his opinion upon an often recurring and imperfectly understood question of criminal law. To chief constables and others who have the direction of the police, Mr. Greaves' remarks are invaluable. The author shows most distinctly the error into which the *Times* has fallen when it stated broadly that "in a case of mere misdemeanour, indeed, except when a Statute enacts otherwise, a private individual is not justified in arresting without a warrant; and even an officer is not justified in so arresting, unless the misdemeanour is committed in his presence."

The general proposition (says Mr. Greaves) as to private individuals is partly correct and partly erroneous. It is correct as to the cases of omissions and neglects, which have already been mentioned (such, for instance, as the neglect to provide food for a child or apprentice, the neglect to repair a highway by a party bound to repair *ratione tenuræ*;) "but it is erroneous in numerous other cases; and the important question is whether it is not erroneous in every case where the party is caught in the act—and whether, in every such case, a private person may not lawfully arrest the offender without a warrant." After quoting many decisions, Mr. Greaves seems to be of opinion that there has been, from very early times indeed, a regular current of decisions and judicial opinions, that any private person may arrest an offender caught in the act of committing a misdemeanour, and consequently that *Hollyday v. Oxenbridge* was only an instance of a previous well known rule. The right of arresting affrayers and persons found committing offences by night, with many other matters, is subsequently argued, and quotations are made from all the leading cases. The next contribution, also from Mr. Greaves' pen, is a lucid exposition of the obscure law of attempts to commit crimes. Then follow all the Statutes, and portions of Statutes, referring to criminal law as affected by Statute, and by judicial decision from the passing of the Criminal Law Consolidation Acts, to the end of the last session of Parliament, accompanied by most valuable notes, and, a *sine qua non* in such a work, a most copious index easy of reference. We are grateful to the writers for this book, which will be found a great assistance not only to those who have to administer the law, but to the legal profession. Devoid of pretence, simple and accurate in language, the essays upon the various subjects must ensure careful attention and considerable approbation. From their manner of treatment, the subjects may be read with interest by lay readers, while they resolve many doubts which have troubled our lawyers. We could only suggest that in a fresh edition, in order to make the

Criminal Law Consolidation Acts a complete epitome, it might be advisable to introduce a list of the foreign States, with which arrangements have been made for the surrender of criminals under the Extradition Act.

A Treatise on the Rules for the Selection of the Parties to an Action. By A. V. Dicey, Esq., of the Inner Temple, Barrister-at-Law, and Fellow of Trinity College, Oxford. London: Moxwell & Son. 1870.

THIS is exactly what a work on such a subject ought to be, combining the qualities of an admirable treatise with those of a convenient book of practice. It is no mere digest of cases or compilation from other writers, but from first to last shows unmistakable evidence of analytical and deductive power on the part of the author. The aim of Mr. Dicey has been to reduce the law of parties to an action to a systematic form, and the mode in which this is accomplished is by stating the law in a series of rules, each of which is illustrated by cases, and confirmed by quotations from judgments, or from text-books of authority. The advantages of such an arrangement in a book of reference are obvious, and in such a subject as that which is here treated, it serves to exhibit the substantial principles on which the whole of this branch of the law is founded.

From the examination we have been able to give to the work, we can have no hesitation in expressing a very favourable opinion as to the manner in which Mr. Dicey has executed the task he has undertaken. The general arrangement of the treatise is, of course, the simple and natural one which obviously suggests itself, viz., rules common to all actions, rules in actions on contract, and rules in actions for tort. But in framing the rules under the different heads, the author has shown great clearness and accuracy of expression, and much logical skill in the order he has adopted. The illustrative cases and quotations are carefully collected and greatly to the point; they fully explain the subject which is under consideration, without encumbering it with irrelevant matter. Many of the questions discussed are of a difficult and intricate nature, but on all the subjects which we have looked into, we have found definite statements and sound views. It may perhaps be objected by some, that Mr. Dicey has too much enlarged the scope of the work, and has given us more law than merely relates to parties to actions. But it was scarcely possible to avoid this in what was intended to be a systematic treatise, and while such a comprehensive treatment will in no degree impair the value of the work for practical purposes, it will render it all the more valuable to the student.

The Common Law and Equity Practice of the County Courts, with Scales of Costs and Fees, the new Rules, and the more important Forms. By George Washington Heywood, Barrister-at-Law. London: W. Maxwell & Sons; Manchester: Able Heywood & Son. 1870.

A MORE concise and practical little book on a separate branch of law, whether for lawyers or laymen, we have seldom had occasion to notice. The method of arrangement adopted is that of tracing an action step by step through its various stages; and though the author has not gone much into detail of the cases cited, yet he has given in a few words the substance of the various precedents. All the costs and principal forms appertaining to a suit, both in Common Law and in Equity, are given in the appendices, and a voluminous index forms a ready reference to the contents of the volume. In consequence of the prospect of a Consolidation Act next session, and a readjustment of the Courts, the author has not thought proper, just now, to extend the bulk of the volume so as to include the provisions relating to Bankruptcy, Probate, or Admiralty. This is an unfortunate omission from a Text Book, which should treat of all matters coming under the jurisdiction of the Courts to which it has special reference. However, the business in the Courts at present being very small under either of those heads, and for the reasons assigned, some allowance may be made. It is to be regretted that the author had not waited another month or two before going to press, as, in that case, he would have had the advantage of adopting the legislative enactments of the session. The only Act he quotes was passed on June 20, while the Married Women's Property Act was passed on August 9, the provisions of which would have rendered necessary important alterations in several parts of the work. The author is indebted to his friend, Mr. S. B. L. Dunn, of the Chancery Bar, for an excellent chapter upon Equitable Jurisdiction. This being comparatively a new feature in County Court practice, the author has treated of it at some length, and has made ample references. The forms, too, are given entire. Altogether the work, at the low price of five shillings, is deserving encouragement.

Annotazioni alle Leggi Criminali per l'Isola di Malta e sue Dipendenze da essere di guida al Giurato. By a young Maltese Advocate. Malta, 1870.

IN the book before us we have an interesting account of the gradual adoption of the system of jury trial in Malta, as well as an able commentary of the new Penal Code for the Island. Jury trial was first introduced in Malta in 1815, in connection with a court for the trial of pirates, but cases of that kind were few, and for a long time a strong apprehension existed that it would not work well.

When, however, Sheriff Jameson went to Malta, to revise the code in 1842, he strongly recommended the introduction of jury trial in all criminal cases, and since then, by degrees, the principle has made way, till now it is in full operation. The Criminal Code applies to crimes committed by Maltese subjects in Malta and her dependencies; on the seas between the limits of the territorial jurisdiction of Malta; on board Maltese ships by Maltese subjects, out of the territorial jurisdiction of Malta; and within the dominions of the Porte. And in the commentary before us, there are able observations showing the familiarity of the author with the principles of private International Law, as well as with the general character of the Italian and other codes. We welcome this volume especially because we have quite a dearth of works on Colonial Laws. A collection of Colonial Laws is a great desideratum both for British jurisprudence, and for the guidance of the British courts in all our widely scattered possessions.

The Natural History of Law. By G. J. Johnson. Birmingham: Josiah Allen, Jun. 1870.

THE above is the title of a pamphlet reprinted from the essays of the Birmingham Speculative Club. We will not attempt to discuss Mr. Johnson's theory, the main propositions of which he says can be verified by Scripture, as well as the Statutes at large. The paper is cleverly written, and indicates that the author has bestowed great pains in its preparation.

The Journal of Jurisprudence and Scottish Law Magazine, for August, September, and October. Edinburgh: T. and T. Clark. 1870.

THE first of these numbers starts with some comments on the Digest of Law Commission, which unfortunately proved a failure, and recommends that the Government should appoint an experienced barrister to report upon the order, method, cost and machinery, for forming a Digest. Legal education is now a subject cropping up in Scotland as well as here. Much, therefore, is very sensibly put forward in reference to it. The law of nations, and the legal doctrine of the balance of power, is the subject of an article well worth perusing just now. Whilst deprecating the abuses and defects of late years in regulating the balance of power, the author urges that the principle is useful for the maintenance of the independence of each and all. The series of ably-written articles on the conflict of laws come to an end. Others on points of law appear, which, with the monthly reports of cases decided, statistics and local news make up the contents of this North British periodical.

The Canada Law Journal. Toronto. 1870.

The Albany Law Journal. Albany. 1870.

The Australian Jurist. Melbourne. 1870.

THE first of these maintains its former position as a full reporter of the cases decided in the Courts of Law. To the Colonial practitioner these cases will be found exceedingly useful. In addition, original articles and reprints are given in each number. The editor of the Albany, the only periodical, we believe in existence, that seeks to amuse the profession as well as instruct, by an arrangement of old and curious anecdotes and verses, ancient and modern, on the science and administration of the law, assures us that he has been complimented by one of our contemporaries, and scolded by another, for being too prone to fun and not sufficiently alive to a sense of the dignity of the law. In reply to this the editor as a body corporate assures our "sedate contemporary that we shall try to curb our fun now that vacation is over. We have been endeavouring to sugar-coat the dry pills of the law for summer treatment. Hereafter we shall endeavour to be as dignified—we cannot be as learned—as our kindly cousin-in-law."

We hope the editor will not become too grave at a season when mirth is more required to brighten up our faculties. The transition may be easy, but the re-assumption would be, we imagine, something analogous to a display of levity on the Bench. The "Humorous Phases of the Law," we should be sorry to see dropt. Light articles such as these, mixed up with current topics, with here and there a dash of fun, serves well as a relief to the reader of a more heavy and drier material, such as the Digest of Cases, &c. We have noticed some reprints from our Magazine. We have regularly received the numbers of the last named, which is a new weekly journal. Some need of such a publication as a means of reporting legal proceedings was no doubt much felt among the profession. In this way it will be useful for reference, and at the same time keep its subscribers well informed on the legal topics of the day.

Events of the Quarter, &c.

PROCLAMATION OF NEUTRALITY.

THE following is the Proclamation of Neutrality issued by Her Majesty at the commencement of the present war :—

Whereas, we are happily at peace with all Sovereigns, Powers, and States ;

And, whereas, notwithstanding our utmost exertions to preserve peace between all Sovereign Powers and States, a state of war unhappily exists between His Imperial Majesty the Emperor of the French and His Majesty the King of Prussia, and between their respective subjects and others inhabiting within their countries, territories, or dominions ;

And whereas we are on terms of friendship and amicable intercourse with each of these Sovereigns, and with their several subjects, and others inhabiting within their countries, territories, or dominions ;

And whereas great numbers of our loyal subjects reside and carry on commerce, and possess property and establishments, and enjoy various rights and privileges within the dominions of each of the aforesaid Sovereigns, protected by the faith of treaties between us and each of the aforesaid Sovereigns ;

And whereas we, being desirous of preserving to our subjects the blessings of peace, which they now happily enjoy, are firmly purposed and determined to abstain altogether from taking any part, directly, or indirectly, in the war now unhappily existing between the said Sovereigns, their subjects, and territories, and to remain at peace with, and to maintain a peaceful and friendly intercourse with each of them, and their respective subjects, and others inhabiting within any of their respective countries, territories, and dominions, and to maintain a strict and impartial neutrality in the said state of war unhappily existing between them ;

We, therefore, have thought fit, by and with the advice of our Privy Council, to issue this our Royal Proclamation.

And we do hereby strictly charge and command all our loving subjects to govern themselves accordingly, and to observe a strict neutrality in and during the aforesaid war, and to abstain from violating or contravening either the laws and statutes of the realm in this behalf or the law of nations in relation thereto, as they will answer to the contrary at their peril.

And whereas in and by a certain statute made and passed in the present year of Her Majesty, entitled, “An Act to regulate the

conduct of Her Majesty's subjects during the existence of hostilities between foreign States with which Her Majesty is at peace," it is, among other things, declared and enacted as follows :—

"Illegal Enlistment.

"If any person, without the licence of Her Majesty, being a British subject, within or without Her Majesty's dominions, accepts, or agrees to accept, any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with Her Majesty, and in this Act referred to as a friendly State, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign State as aforesaid, —

"He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour.

"If any person, without the licence of Her Majesty, being a British subject, quits or goes on board any ship with a view of quitting Her Majesty's dominions, with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State, or, whether a British subject or not, within Her Majesty's dominions, induces any other person to quit or go on board any ship with a view of quitting Her Majesty's dominions with the like intent, —

"He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour.

"If any person induces any other person to quit Her Majesty's dominions, or to embark on any ship within Her Majesty's dominions, under a misrepresentation or false representation of the service, in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State, —

"He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted, and imprisonment, if awarded, may be either with or without hard labour.

"If the master or owner of any ship, without the licence of Her Majesty, knowingly takes on board, or engages to take on board, or has on board such ship within Her Majesty's dominions any of the following persons, in this Act referred to as illegally enlisted persons, — that is to say,

"(1.) Any person who, being a British subject within or without

the dominions of Her Majesty, has, without the licence of Her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign State at war with any friendly State :

“(2.) Any person, being a British subject, who, without the licence of Her Majesty, is about to quit Her Majesty’s dominions with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State :

“(3.) Any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State :

“Such master or owner shall be guilty of an offence against this Act, and the following consequences shall ensue,—that is to say,

“(1.) The offender shall be punishable, by fine or imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted ; and imprisonment, if awarded, may be either with or without hard labour ; and

“(2.) Such ship shall be detained until the trial and conviction or acquittal of the master or owner, and until all penalties inflicted on the master or owner have been paid, or the master or owner has given security for the payment of such penalties to the satisfaction of two justices of the peace, or other magistrate or magistrates having the authority of two justices of the peace ; and

“(3.) All illegally enlisted persons shall, immediately on the discovery of the offence, be taken on shore, and shall not be allowed to return to the ship.

“Illegal Shipbuilding and Illegal Expeditions.

“If any person within Her Majesty’s Dominions, without the licence of Her Majesty, does any of the following acts—that is to say,

“(1.) Builds, or agrees to build, or cause to be built, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State ; or

“(2.) Issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State ; or

“(3.) Equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State ; or

“(4.) Despatches, or causes, or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State :

"Such person shall be deemed to have committed an offence against this Act, and the following consequences shall ensue :—

"(1.) The offender shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

"(2.) The ship in respect of which any such offence is committed and her equipment shall be forfeited to Her Majesty.

"Provided, that a person building, causing to be built, or equipping a ship in any of the cases aforesaid, in pursuance of a contract made before the commencement of such war as aforesaid, shall not be liable to any of the penalties imposed by this section in respect of such building or equipping if he satisfies the conditions following—that is to say,—

"(1.) If forthwith upon a proclamation of neutrality being issued by Her Majesty he gives notice to the Secretary of State that he is so building, causing to be built, or equipping such ship, and furnishing such particulars of the contract, and of any matters relating to, or done, or to be done under the contract, as may be required by the Secretary of State.

"(2.) If he give such security, and takes and permits to be taken such other measures, if any, as the Secretary of State may prescribe for insuring that such ship shall not be despatched, delivered, or removed without the licence of Her Majesty until the termination of such war as aforesaid."

"Where any ship is built by order of or in behalf of any foreign State when at war with a friendly State, or is delivered to, or to the order of such foreign State, or any person who to the knowledge of the person building is an agent of such foreign State, or is paid by such foreign State or such agent, and is employed in the military or naval service of such foreign State, such ship shall, until the contrary is proved, be deemed to have been built with a view to being so employed, and the burden shall lie on the builder of such ship of proving that he did not know that the ship was intended to be so employed in the military or naval service of such foreign State.

"If any person within the dominions of Her Majesty, and without the licence of Her Majesty—'By adding to the number of the guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases or augments, or procures to be increased or augmented, or is knowingly concerned in increasing or augmenting, the warlike force of any ship which at the time of her being within the dominions of Her Majesty was a ship in the military or naval service of any foreign State at war with any friendly State, such persons shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.'

"If any person within the limits of Her Majesty's dominions, and without the licence of Her Majesty—

"Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue :

"(1.) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the Court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

"(2.) All ships and their equipments, and all arms and munitions of war, used in, or forming part of such expedition shall be forfeited to Her Majesty.

"Any person who aids, abets, counsels, or procures the commission of any offence against this Act shall be liable to be tried and punished as a principal offender."

And whereas by the said Act it is further provided that ships built, commissioned, equipped, or despatched, in contravention of the said Act may be condemned and forfeited by judgment of the Court of Admiralty, and that if the Secretary of State or chief executive authority is satisfied that there is a reasonable and probable cause for believing that a ship within Her Majesty's dominions has been or is being built, commissioned, or equipped contrary to the said Act, and is about to be taken beyond the limits of such dominions, or that a ship is about to be despatched contrary to the Act, such Secretary of State, or chief executive authority, shall have power to issue a warrant authorizing the seizure and search of such ship, and her detention until she has been either condemned or released by process of law : And whereas certain powers of seizure and detention are conferred by the said Act on certain local authorities :

Now, in order that none of our subjects may unwarily render themselves liable to the penalties imposed by the said Statute, we do hereby strictly command that no person or persons whatsoever do commit any act, matter, or thing whatsoever contrary to the provisions of the said Statute, upon pain of the several penalties by the said Statute imposed, and of our high displeasure.

And we do hereby further warn and admonish all our loving subjects, and all persons whatsoever entitled to our protection, to observe towards each of the aforesaid Sovereigns, their subjects, and territories, and towards all belligerents whatsoever, with whom we are at peace, the duties of neutrality; and to respect, in all and each of them, the exercise of those belligerent rights which we and our Royal predecessors have always claimed to exercise.

And we hereby further warn all our loving subjects, and all persons whatsoever entitled to our protection, that, if any of them shall presume, in contempt of this our Royal Proclamation, and of our high displeasure, to do any acts in derogation of their duty as subjects of a neutral Sovereign, in a war between other Sovereigns, or in violation or contravention of the law of nations in their behalf, as more especially by breaking, or endeavouring to break, any

blockade lawfully and actually established by or on behalf of either of the said Sovereigns, or by carrying officers, soldiers, despatches, arms, ammunition, military stores or materials, or any article or articles considered and deemed to be contraband of war, according to the law or modern usages of nations, for the use or service of either of the said Sovereigns, that all persons so offending, together with their ships and goods, will rightfully incur, and be justly liable to, hostile capture, and to the penalties denounced by the law of nations in that behalf.

And we do hereby give notice, that all our subjects and persons entitled to our protection who may misconduct themselves in the premises, will do so at their peril, and of their own wrong; and that they will in no wise obtain any protection from us against such capture or such penalties as aforesaid, but will, on the contrary, incur our high displeasure at such misconduct.

Given at our Court at (Osborne-house, Isle of Wight, this 9th day of August, in the year of our Lord one thousand eight hundred and seventy, and in the thirty-fourth year of our reign.

God Save the Queen.

THE NEW LAW COURTS.

At a meeting of the Metropolitan Board of Works, held in August, Sir J. Thwaites in the chair, Mr. Le Breton presented a memorial, signed by 562 barristers and firms of solicitors having chambers in Lincoln's Inn and its vicinity, asking the co-operation of the Board in carrying out a proposed new road from Southampton Row, Holborn, to the Strand, and the Victoria Embankment at Norfolk Street—a scheme which had received the approval of the Hon. Society of Lincoln's Inn, the Council of the Incorporated Law Society, the First Commissioner of Works, and Mr. Street, the architect of the New Palace of Justice. This would be in conjunction with the proposed Mid-London Railway, which would have a junction at Hampstead with the London and North-Western, and would run on the Waterloo Station of the South-Eastern Railway, thereby enabling passengers and goods to be conveyed direct from the northern and midland counties to Folkestone, Dover, and the Continent without change of carriages. The memorial went on to say:—"That the promoters of the aforesaid railway are willing, as a concession to the public, to co-operate with your Board in constructing the following new roads in the line of their railway, that is to say:—(1.) A road from Vernon Place, Southampton Row, passing across Kingsgate Street to Holborn, and thence in the line of the Little Turnstile and Gate Street to the north-west corner of Lincoln's Inn Fields. (2.) A road from the south-west corner of Lincoln's Inn Fields, passing through Clare Market, and crossing Wych Street and Holywell Street to the Strand. (3.) An enlargement of Norfolk Street leading down to the roads now in course of construction which will communicate with the Thames Embankment. It is also proposed to make a direct communication between Vernon's Place and Theobald's Road, and to remove the pile of buildings between

Holywell Street and the Strand, and to widen the latter at its present narrowest point to seventy feet. That the aforesaid road, if constructed as proposed, will bring into communication, by a direct road, the Thames Embankment, the Strand, Holborn, and the Euston Road, with the districts of Hampstead, Highgate, Kentish Town, Holloway, and in general, the northern parts of London. That no such road now exists; and, in particular, that the district between Holborn and the Strand is entirely without means of communication except by narrow and tortuous streets of the worst character. That the proposed new openings will be most conveniently situated for giving access to the new Courts and offices of law, seeing that the section connecting Lincoln's Inn Fields with the Strand will pass very near to the west side of the site now selected for those buildings." The memorial was received and referred to the Works Committee.

The following estimate of the sum required in the year ending March 31, 1871, to enable the Lords Commissioners of Her Majesty's Treasury to make the necessary advances for the purchase of a site, erection of building, and other expenses, for the New Courts of Justice and Offices belonging thereto, under the "Courts of Justice Concentration (Site) Act, 1865," and the "Courts of Justice Building Act, 1865"; the amount of such advances to be repaid to the Consolidated Fund out of the surplus interest of the Court of Chancery, is 21,450*l*.

Sub-heads under which this vote will be accounted for by the Commissioners of Her Majesty's Works:

A.—Purchase of property	£2,000
B.—Erection of building	16,000
C.—Rates, taxes, &c.	3,000
D.—Incidental expenses	450

The total expenditure for purchase of property up to March 31, 1870, comprised the following items, viz.:

	£	s.	d.	£	s.	d.
Purchase moneys, compensation, and interest	792,051	6	7			
Vendors' costs	36,819	8	3			
Surveyor's charges	8,336	5	0			
Legal expenses	28,610	5	5			
Accountants, clerks, &c.	3,433	19	6			
Preliminary expenses (Parliamentary agents, &c.), expenses of Royal Commission	17,750	16	4			
				887,002	1	1

In addition to which there has been paid—

(1.) To the architect on account of commission	2,000	0	0
(2.) For rates, taxes, &c.	10,258	8	9
(3.) For care of site, incidental expenses, &c.	1,040	11	3

Total expenditure . . £900,301 1 1

The net proceeds of the sales of old materials, amounting up to March 31, 1870, to about 10,550*l.*, have been treated as extra receipts, and by directions of the Treasury paid over to Her Majesty's Exchequer.

CRIMINAL STATISTICS OF IRELAND.

THE following is a comparative summary of the principal statistical results noticed in the Irish Report of Criminal Statistics, prepared by Dr. Neilson Hancock :—

The exceptional amount of crime at the end of 1869, and at the beginning of 1870, which led to the passing of the Peace Preservation Act in April, 1870 (Stat. 33 Vict. c. 9), is indicated by the statistics of agrarian and other outrages specially reported by the Constabulary. The agrarian outrages so reported increased from 19 in July to 337 in December, 1869. In January the number increased to 391, and after a sudden decrease in February, rose again to 356 in March. In July, 1870, the latest date before the presentation of this Report, the number of these outrages had fallen to 17, which is less than the number (19) in July, 1869, but is high as compared with the number (8) in July, 1868, or the number (5) in July, 1866, the year in which agrarian crime was at a minimum. The number of outrages so reported *other than agrarian*, which increased from 224 in August, 1869, to 248 in November, 1869, and to 385 in March, 1870, was reduced in June to 206. In July, a month usually exceptional with regard to outrages, the number reached 256, which, however, was less than the number (260) in July, 1869.

The general characteristics of Irish crime in 1869, as compared with crime in preceding years, are indicated by the following figures :—The number of treasonable and seditious offences attained its maximum in 1867, the year of the rising at Tallaght, near Dublin. The number of these offences in that year was 836. It fell to 126 in 1868, and to 68 in 1869. In the most heinous class of these offences, viz.—treasonable felony—the diminution was most marked, the cases being 385 in 1867, 16 in 1868, and only 3 in 1869. The best standard for the comparison of serious crime in general for a series of years is the number of persons for trial. This number attained a maximum in the year of distress, 1862, and again in 1867. The number of persons for trial was 6666 in 1862, 4561 in 1867, and 4151 in 1869; and making allowance for the difference of population, the number of persons for trial in every 100,000 of the people was 115 in 1862, 82 in 1867, and 75 in 1869, showing a decrease in 1869 of 9 per cent. as compared with the number for trial and population in 1867, and of 35 per cent. as compared with the number for trial and the population in 1862.

The criminal statistics of Ireland in 1869, and those of England and Wales for 1868, present the following points of comparison :—There was no person sentenced to death in Ireland, whilst 21 persons were sentenced to death in England and Wales in 1868, and 12 of these were executed. The verdicts of coroners' juries

show 33 cases of murder of persons above the age of 1 year in Ireland as compared with 25 in an equal portion of the population of England and Wales. A comparison of the number of indictable offences (not disposed of summarily) in Ireland with the number in a portion of the population of England and Wales equal to that of Ireland presents the following results—The number of such offences in Ireland in 1869 was 9178 as compared with the number (15,149) in an equal portion of the population of England and Wales. Comparing the statistics of the two countries with regard to the classes of crime, we find that there was an excess in England and Wales over Ireland of 6465 offences against property without violence, of 1006 offences against property with violence, of 241 cases of forgery and offences against the currency, of 112 attempts to commit suicide, of 59 cases of concealing birth, rape, and other immoral offences, of 40 attempts at murder and manslaughter, of 25 unnatural offences, and of 19 cases of perjury. From the number in excess in England, the following classes of offences showing an excess in Ireland, are to be set off in calculating the total excess. The offences showing an excess in Ireland consisted of 734 assaults, 678 unclassified offences, 511 malicious offences against property, 37 cases of riot, and 9 murders. The number of offences disposed of summarily (other than common assaults) which might be indicted was, in Ireland, 19,421, while in a portion of the population of England and Wales equal to that of Ireland, the number of this class of offences was 25,596. In offences disposed of summarily, comprising common assaults, offences against Acts of Parliament, and other offences not included under these heads, the number was 219,969 in Ireland, and in an equal portion of the population of England and Wales the number was 100,238. In connexion with this excess of minor offences in Ireland, it is to be observed that the Irish police act as inspectors of weights and measures, and as a revenue police. They are also much more numerous in proportion to the population than in England and Wales. The less serious character of the offences disposed of summarily in Ireland is shown by the nature of the punishments. In only 9 per cent. of the cases were the persons punished by imprisonment, while in 25 per cent. of the cases in England and Wales this punishment was inflicted. On the other hand, in 79 per cent. of the cases in Ireland fines were imposed, and in only 62 per cent. of the cases in England and Wales. The number of criminal classes known to the police was 7448 in Ireland, as compared with 14,509 in an equal portion of the population of England and Wales.

The statistics of offences in connexion with the Contagious Diseases Act, to show the extent of its operation, have not been collected for the present volume, but the following statistics have an important bearing upon the social aspects of the question by indicating a very intimate connexion between sexual immorality and crime in the following respects:—One-third of the whole number of women apprehended for indictable offences in Ireland were prostitutes, and nearly one-third of the women proceeded against summarily belonged

to the same class; and of those undergoing imprisonment no less than 61 per cent. The Coroners' statistics with respect to verdicts of wilful murder of children aged one year and under show 43 cases of infanticide in Ireland as compared with 42 in an equal portion of the population of England and Wales. The recent disclosures as to baby-farming and unregistered burial of still-born children, however, indicate that infanticide prevails to a greater extent in England than is disclosed by the coroners' returns. The number of infanticides ascertained by coroners' juries is in Ireland about 53 times, and in England and Wales 55 times, the number of murders occurring amongst an equal portion of the population at other periods of life on an average.

The extent to which crime amongst women arises from their being deprived of the benefit of home influence is shown by the statistics of prisoners of Irish birth in prisons in England and Wales. While the number of men of Irish birth in English prisons in 1869 was only 11 per cent. of the entire number of prisoners, the number of women of Irish birth in the same prisons reached 22 per cent., or nearly a fourth of the entire number. The defects in our existing arrangements, both in Ireland and England and Wales, for securing the education of the most helpless classes of the community and those most exposed to temptation, is shown by the following figures:—In Ireland 37·4 per cent. of the men and 51·2 of the women, undergoing imprisonment, could neither read nor write, and 33 per cent. of the men and 40 per cent. of the women, undergoing imprisonment in England and Wales were in the same state of ignorance. Of the children committed to reformatories in 1869, 48·5 per cent. could neither read nor write; 35 per cent. could read, or read and write imperfectly; and only 16·5 per cent. could read and write well. Of the children committed in 1868 to English reformatories, 51·6 per cent. could neither read nor write, 40·8 per cent. could read and write imperfectly, and only 7·6 per cent. could read and write well. The want of industrial schools to meet the case of neglected children, which has been pointed out in these statistics for many years, was remedied by the extension of the Industrial Schools Act to Ireland, in 1868. No less than 22 schools have been opened under the Act in 1869, and 232 children received.

With regard to another helpless class of offenders, viz., Criminal Lunatics, the salutary change in the law providing against their being detained in gaols, which was passed in 1867 (Stat. 30 & 31 Vict. c. 118), has been carefully carried into effect. The number of Lunatics detained in gaols was—on the 31st December, 1867, 331; on the 31st December, 1868, 52; and on the 31st December, 1869, only 5. The number of criminals under detention as Lunatics in Ireland in 1869 was 2932, whilst the number in 1868, in a portion of the population of England and Wales equal to that of Ireland, was only 216. The excess appears to be caused by the very large number committed by justices as dangerous persons at large. Three thousand five hundred and thirty-eight persons were

committed by justices in Ireland, and only 38 in England and Wales. Of these, 3240 were committed as dangerous persons at large in Ireland, and 52 for want of sureties, while only 17 were committed in England and Wales for want of sureties, and none as dangerous persons at large.

With regard to the detection of crime, it appeared from information collected, prior to the introduction of the Peace Preservation Act, 1870, that very serious difficulty existed, as in previous years, in securing the detection or conviction of persons for agrarian crime. But taking the entire number (9178) of crimes returned (including agrarian offences) the number of persons apprehended was 6001, or in the proportion of 65 per cent. to the crimes returned. In England and Wales the apprehensions were only in the proportion of 49·9 per cent., and it is stated that the highest number of apprehensions for crimes ever attained in England was in 1863, when it was 58 per cent. The larger number of persons apprehended and the system of public prosecutions in Ireland leads to a larger number of cases of strong suspicion being prepared for prosecution than in England and Wales, where prosecutions are to such a large extent in private hands. This leads to a larger number of prosecutions being abandoned, and a larger number of bills being ignored by the Grand Juries. The number not prosecuted in England and Wales was 32, or 0·15 per cent. of the prisoners sent for trial, while the number not prosecuted in Ireland was 364, or 8·7 per cent. Of 20,091 persons committed in England and Wales, the number with respect to whom the Grand Jury ignored the bills was only 937, or 4·6 per cent. Of 4151 persons committed for trial in Ireland, the number against whom the bills were ignored was 413, or 10 per cent. Of those actually brought to trial the acquitted were 860, or 26 per cent. The number of convictions was 2452, or 74 per cent. In England and Wales the acquittals were 4046, or 21·2 per cent.; and the convictions numbered 15,033, or 78·8 per cent.

LOCAL TAXATION.

THE following report has been issued by the Select Committee appointed to inquire and report whether it is expedient that the charges now locally imposed on the occupiers of rateable property should be divided between the owners and occupiers, and what changes in the constitution of the local bodies now administering rates should follow such division:—

“(1.) The Committee, without pledging themselves to the view that all rates should be dealt with in the same manner, are of opinion—(a) that the existing system of local taxation, under which the exclusive charge of almost all rates leviable upon rateable property for current expenditure, as well as for new objects and permanent works, is placed by law upon the occupiers, while the owners are generally exempt from any direct or immediate contributions in respect of such rates, is contrary to sound policy; (b) that the evidence taken before your Committee shows that in many cases the burden of

the rates, which are directly paid by the occupier, falls ultimately, either in part or wholly, upon the owner, who, nevertheless, has no share in their administration; (c) that in any reform in the existing system of local taxation, it is expedient to adjust the system of rating in such a manner that both owners and occupiers may be brought to feel an immediate interest in the increase or decrease of local expenditure, and in the administration of local affairs; (d) that it is expedient to make owners as well as occupiers directly liable for a certain proportion of the rates; (e) that, subject to equitable arrangements as regards existing contracts, the rates should be collected, as at present, from the occupier (except in the case of small tenements, for which the landlord can now by law be rated), power being given to the occupier to deduct from his rent the proportion of the rates to which the owner may be made liable, and provision being made to render persons having superior or intermediate interests liable to proportionate deductions from the rents received by them, as in the case of the income-tax, with a like prohibition against agreements in contravention of the law.

“(2.) The Committee have examined many witnesses, and received at their hands very conflicting opinions as regards the proportion in which the burden of rates at present falls relatively on owners and occupiers.

“(3.) That in the event of any division of rates between the owner and occupier, it is essential that such alterations should be made in the constitution of the bodies administering the rates as would secure a direct representation of the owners adequate to the immediate interest in local expenditure which they would thus have acquired.

“(4.) That justices of the peace should no longer act *ex officio* as members of any local board in which such direct representation of owners has been secured.

“(5.) That the great variety of rates levied by different authorities, even in the same area, on different assessments, with different deductions and by different collectors, has produced great confusion and expense, and that in any change of the law as regards local taxation, uniformity and simplicity of assessment and collection, as well as economy of management, ought to be secured as far as possible.

“(6.) That the consolidation into one rate of all local rates collected within the same area is a matter of great importance, and that your Committee concur in the resolution of the Select Committee on Poor Rates Assessment, 1868, which recommended one consolidated rate—viz., ‘that a demand note should be left with each ratepayer on the rate being made, stating the amount of the requisitions, the rate in the pound for each purpose, and the period for which the rate is made, the rateable value of the premises, the amount of the rate thereon, and of each payment’ of the instalments of the rates.

“(7.) That while it is necessary to make provision for limiting, as far as practicable, the disturbance of existing contracts, it would be, on many grounds, undesirable and almost impracticable to extend the

exemption of property held under leases from the operation of the proposed changes until the expiration of such leases.

“(8.) That the exclusion of the owners of property held under long leases from the right of voting for local authorities, after the proposed changes had taken effect in respect of other property, would lead to much inconvenience and confusion; while, on the other hand, it would be inadmissible to allow them to vote unless they acquired an immediate interest in the rates.

“(9.) That the difficulties of the case would be equitably met by exempting the owners of property held under lease from the proposed division of rates for a period of three years, and by providing that after the expiration of that time the occupiers of such property should be entitled, equally with all other occupiers, to deduct from the rent the proportionate part of the rates to which the owner may become liable, power being given to the owner at the same time to add to his rent a sum equivalent to the like proportionate part of the rates, calculated on the average annual amount of the rates paid by the occupier during the three years above referred to.

“(10.) That by the terms of the reference to them, your Committee were limited to the question of the division of the charges on rateable property between the owners and occupiers, and what changes in the constitution of local bodies administering rates should follow such division; and they have consequently been precluded from entering upon the inquiry of the relations of local and imperial taxation, and the nature of the property liable to the same.

“(11.) That your Committee are of opinion that the inquiry on which they have been engaged forms only one branch of the general question of local taxation, and that other considerations, besides those which have been submitted to their investigation, should be previously taken into account in any general measure giving effect to the above recommendations.”

PRISON MINISTERS' ACT.

THE Select Committee appointed to inquire into the operation of the Prisons Act and Prison Ministers Act, so far as respects the religious instruction provided for prisoners other than those belonging to the Established Church, have agreed to the following report:—

“Your Committee have taken evidence upon the working of the Prisons and Prison Ministers Acts, by which the appointment of prison ministers other than the chaplain of the Established Church is left to the discretion of the different prison authorities throughout the country. The result has been great inequality in the working of the system. In some prisons a Roman Catholic prison minister is appointed with an adequate salary, and is placed on terms of equality with the Protestant chaplain; in others a Roman Catholic prison minister is appointed with a salary, but is not permitted to assemble the Roman Catholic prisoners for Divine service, being restricted to visiting them in their cells; in a third class, a Roman Catholic clergyman is permitted to visit the prisoners of his persuasion, and to assemble them for Divine service, but is denied a salary, while in a

fourth the visits of a Roman Catholic clergyman are only permitted at the express desire of a prisoner. This inequality is specially felt as a grievance by Roman Catholic prisoners, who cannot receive the ministrations of the Established Church without offending against the laws of their own religious persuasion.

"Your Committee are of opinion that it is inexpedient and contrary to sound policy that such inequality should exist in the working of our prison system, and that it is desirable that prisoners of all religious persuasions should be, as far as possible, placed upon a footing of equality with regard to religious ministration and instruction. In this opinion they are supported by the evidence of Captain DuCane, Colonel Henderson, the late Chairman of the Directors of Convict Prisons, and Sir Walter Crofton, as to the satisfactory working of the system in the Government prisons, where salaried Roman Catholic chaplains attend the prisoners of their own persuasion, and are recognised as officers of the prison. Your Committee recommend that this system should be made general throughout the country.

"The complaints which have arisen have related almost exclusively to Roman Catholics. The cases in which Protestant prisoners have objected to join in Church of England worship, or to receive spiritual assistance from the chaplain, are very rare, and your Committee are of opinion that when such cases may occasionally occur, they may be satisfactorily met by the prison authorities under the powers which, by Act of Parliament, they at present possess.

"Your Committee are, therefore, of opinion that prison authorities should be required by law to appoint Roman Catholic ministers in prisons in which Roman Catholic prisoners are confined, and that hereafter the Roman Catholic minister, when so appointed, shall be classed as one of the officers of the prison, and shall receive an adequate salary for his services.

"Your Committee are of opinion that the prison minister so appointed should receive a salary according to the following scale :— If the average number of prisoners belonging to the Roman Catholic religion during the last three years shall have been more than ten and less than twenty, the minimum salary to be 25% ; more than twenty, and less than 100, 50% ; more than 100, and less than 200, 100% ; more than 200, and less than 300, 150% ; more than 300, 200%.

"Your Committee recommend that the Secretary of State should have power to transfer prisoners of any denomination, whose sentences exceed three months, from one prison to another, in order to give greater facilities for religious worship and instruction according to their special tenets."

THE Social Science Association, with which is united the Law Amendment Society, held its annual Congress at Newcastle-on-Tyne, on September 21. Lord Neaves presided over the Jurisprudence Department. The Metropolitan and Provincial Law Association met at Bristol on October 11, under the presidency of J. F. Beaver, Esq. The papers at both meetings were very good and the discussions well attended.

APPOINTMENTS.

LORD JUSTICE MELLISH has received the honour of knighthood, and with Sir William Heathcote, Bart., have been sworn of Her Majesty's Most Honourable Privy Council.

The Attorney-General, Sir Robert Collier, was appointed Recorder of Bristol, but shortly afterwards resigned; thereupon Mr. Montague Berc, Q.C., was appointed Recorder. Mr. J. O. Griffiths, of the Oxford Circuit, has been appointed Recorder of Reading, in the place of Mr. Macnamara, resigned.

Mr. William Hazlitt, Senior Registrar of the Court of Bankruptcy, has been appointed Chief Registrar of that Court, in the place of Mr. J. T. Miller, resigned.

Mr. H. Macnamara, Mr. H. J. Bushby, and Mr. George Chance, have been appointed Metropolitan Stipendiary Magistrates. The first named has since resigned. The vacancies were created by the death of Mr. Selfe and the resignation of Mr. Elliott.

Mr. Edmond Beales has been appointed County Court Judge of the Cambridge District in the room of the late Mr. John Collyer.

Mr. C. S. C. Bowen, Barrister-at-Law, and Mr. A. C. Sellar, Advocate (Secretary to the Lord Advocate), have been appointed Commissioners to inquire into the alleged prevalence of the Truck System, and into the alleged systematic disregard of the Act which prohibits in certain trades the payment of wages in goods. Mr. R. S. Wright, Barrister, Fellow of Oriel College, Oxford, is Secretary.

Mr. H. T. Cole, Q.C., has been appointed to succeed the late Mr. Serjeant Kinglake as leading Counsel to Her Majesty's Post Office on the Western Circuit.

Mr. W. John Ewins Bennett, Mr. J. Stratford Dugdale, and Mr. Charles Hamilton Bromley, have been appointed by the Lord Chief Baron Revising Barristers for the Midland Circuit; Mr. Henry Frederick Gibbons and Mr. Saint have been appointed Assistant Revising Barristers.

Mr. Herbert William Fisher, Barrister-at-Law, has been appointed Vice-Warden of the Stannaries, in the place of Sir Edward Smirke, resigned.

The Eldon Law Scholarship has just been awarded by the Trustees to Mr. Alfred Barratt, B.A., Fellow of Brasenose College, formerly of Balliol College, Oxford.

Mr. Patrick Cumin, Barrister-at-Law, has been appointed an Assistant-Secretary to the Committee of Council on Education.

Professor Leone Levi is delivering eight Lectures at King's College, on the rights and duties of belligerents and neutrals, the effects of war on commerce, and questions connected with contraband of war.

Mr. Edwin Andrew, Solicitor, of Liverpool, has been appointed Town Clerk of the Borough of Salford; Mr. Alexander Grant Meek, Solicitor, Town Clerk of Devizes, and Clerk to the Local Board of Health; Mr. F. Frederick Giraud, Solicitor, Town Clerk of Faversham, and also Clerk of the Peace; Mr. Samuel George Johnson, Solicitor, of Faversham, Town Clerk of the Borough of Nottingham; Mr. O. F. Read, Solicitor, of Mildenhall, Suffolk, Clerk to the Borough Magistrates of Thetford, Lincolnshire; Mr. Edward Arnold, Solicitor and Town Clerk, of Chichester, Clerk to the Magistrates of that city; Mr. Robert Purvis, Solicitor, Clerk to the Magistrates of South Shields; Mr. G. W. Whittall Lovell,

Solicitor, of Banbury, Clerk to the Magistrates of Deddington; Mr. Shafto Robson, Solicitor, of Newcastle and Gateshead, Clerk to the Borough Magistrates of Gateshead. Mr. James Cook, Solicitor, has been elected to the office of Borough Treasurer, of Bridgewater. Mr. Robert Fisher Thompson, Solicitor, has been appointed Registrar of the County Court at Kendal; Mr. John Houshen, Solicitor, Registrar of the Thetford Court. Mr. J. Foster Watson, Solicitor, Assistant Registrar of the County of Liverpool, has been appointed Joint Registrar with Mr. Hine.

Mr. Charles Duffell Faulkner, Solicitor, of Deddington, has been elected Coroner for the Northern Division of Oxfordshire; and Mr. James Read, jun., Solicitor, of Mildenhall, Suffolk, Coroner for the Borough of Thetford.

Mr. Henry Jackson, Solicitor, of St. Helen's Place, City, has been elected Clerk to the Worshipful Company of Cordwainers.

Mr. Frederic Morehouse Metcalf, Solicitor, of Wisbeach, Cambridge-shire, has been appointed a Public Notary by His Grace the Archbishop of Canterbury, with authority to practice at Wisbeach and within a circle of ten miles of that town.

Mr. C. U. Laws, Solicitor, of Newcastle-upon-Tyne, has been appointed by His Grace the Duke of Northumberland to be Steward of the Copyhold of Tynemouth, in the place of Sir Walter Riddell, Bart.

Mr. W. B. Moore, Deputy Clerk to the Borough Magistrates of Wolverhampton, has been appointed Clerk to Mr. J. E. Davis, Stipendiary Magistrate of Sheffield.

IRELAND.—Viscount Monk, the Right Hon. George Alexander Hamilton, and Mr. William Richard Le Fanu, Civil Engineer, have been appointed Commissioners to inquire into and report upon the total amount of the sums received by the Hon. Society of King's Inn, Dublin, upon the admission of attorneys and solicitors, as deposits for chambers; and in what manner the same, or any part thereof, has been applied and disposed of, and whether any, and what portion, of the amount remains unappropriated to the purposes for which it was received, and whether the Incorporated Society of Attorneys and Solicitors of Ireland are in possession of suitable buildings for the accommodation of that branch of the profession of which they are the governing body.

Mr. Samuel M'Curdy Greer has been appointed to the Recordship of Derry, in the stead of the late Mr. Alexander S. Mehan.

Mr. Edward Greer has been appointed Sessional Crown Solicitor for the County of Armagh, in the room of Mr. M'Kinstre, deceased.

SCOTLAND.—Mr. James Arthur Crichton, Advocate, has been appointed Sheriff of Fifeshire, in room of Lord Mackenzie.

Mr. Henry Cockburn MacAndrew, Procurator and Notary Public, Inverness, has been appointed Sheriff Clerk of Inverness-shire, in room of the late Mr. Patrick Grant.

AUSTRALIA.—Mr. R. J. Wallcott, Barrister-at-Law, has been gazetted Attorney-General of the Colony of Western Australia.

INDIA.—Mr. Francis Stranger Leathes, Solicitor, of Bombay, has been appointed Clerk to the Justices of the Peace for the town and island of Bombay.

Necrology.

July.

- 13th. HALIDAY, A. H., Esq., Barrister-at-Law, aged 62.
- 16th. BAYS, George Henry, Esq., Solicitor, aged 72.
- 24th. WELLER, George, Esq., Solicitor, aged 77.
- 25th. HODGKINSON, George, Esq., Solicitor, aged 60.
- 25th. TILLEARD, John, Esq., Solicitor, aged 76.
- 25th. HATCHARD, Samuel, Esq., Barrister-at-Law.
- 26th. ASPLAND, A. Sydney, Esq., Barrister-at-Law, aged 60.
- 27th. LUCAS, Robert W., Esq., Solicitor, aged 54.
- 27th. FOSS, Edward, Esq., Barrister-at-Law, aged 83.
- 31st. WHYTE, J. C., Esq., late acting Judge at Hong Kong.

August.

- 3rd. EMERSON, George, Esq., Barrister-at-Law, aged 34.
- 3rd. NEWMAN, William, Esq., Solicitor, aged 43.
- 3rd. FREEMAN, Luke, Esq., Solicitor, aged 86.
- 5th. WEST, Martin J., Esq., late Commissioner in Bankruptcy, aged 54.
- 8th. BEST, George, Esq., Barrister-at-Law, aged 71.
- 9th. CLARKE, R. Eagle, Esq., Solicitor.
- 11th. RAM, James, Esq., Barrister-at-Law, aged 77.
- 14th. WILLIAMS, J. Price, Esq., Barrister-at-Law, aged 56.
- 17th. BALL, John, Esq., Solicitor, aged 88.
- 17th. CAMPBELL, E. Selby, Esq., Barrister-at-Law, aged 31.
- 20th. SNOWDON, Henry, Esq., Solicitor, aged 62.
- 22nd. POLLOCK, Right Hon. Sir Frederick, Bart., late Lord Chief Baron of the Exchequer, aged 86.
- 23rd. DAVIES, Thomas, Esq., Solicitor, aged 53.
- 25th. JONES, John, Esq., Solicitor.
- 27th. CAVE, Charles, Esq., Solicitor, aged 61.

- 28th. POWELL, James, Esq., Solicitor, aged 45.
- 29th. TOWNSEND, G. B., Esq., Solicitor, aged 56.
- 30th. DEAN, Ellis, Esq., Solicitor, aged 30.

September.

- 1st. COLLYER, John, Esq., County Court Judge, aged 69.
- 6th. NAYLOR, Charles, Esq., Solicitor, aged 64.
- 6th. SELFE, H. Selfe, Esq., Stipendiary Police Magistrate, aged 59.
- 8th. GRUNDY, Thomas, Esq., Solicitor, aged 64.
- 8th. MILNE, Nathaniel C., Esq., Solicitor, aged 66.
- 9th. CHAMBERS, W. G., Esq., Solicitor, aged 24.
- 11th. CLIFFORD, Hon. Charles T., Barrister-at-Law, aged 73.
- 12th. HARDING, T. Tuffley, Esq., Solicitor.
- 12th. CHAPMAN, Benedict L., Esq., Barrister-at-Law, aged 59.
- 13th. CHAWNER, R. Croft, Esq., Barrister-at-Law, aged 65.
- 14th. DODGE, Thomas, Esq., Solicitor, aged 59.
- 16th. GRAY, George, Esq., Solicitor, aged 61.
- 18th. PARKER, George, jun., Esq., Barrister-at-Law, aged 25.
- 19th. DUCKWORTH, Herbert, Esq., Barrister-at-Law, aged 37.
- 21st. MATTHEWS, J. B. D. G., Esq., Solicitor, aged 51.
- 21st. MUSIETT, William, Esq., Barrister-at-Law, aged 70.
- 21st. BISHOP, Thomas, Esq., Solicitor, aged 75.
- 23rd. NORTON, Theodore, Esq., Barrister-at-Law, aged 70.
- 23rd. GRIFFITHS, W. H., Esq., Barrister-at-Law, aged 40.
- 25th. HUBBARD, Joseph J., Esq., Solicitor, aged 69.
- 26th. BACON, W. J., Esq., Barrister-at-Law, aged 32.
- 31st. WHISTON, William, sen., Esq., Solicitor, aged 90.

October.

- 5th. FATHAM, M. S., Esq., Solicitor.
- 10th. WALMSLEY, Thomas, Esq., Solicitor, aged 66.
- 10th. BARRETT, J. Morton, Esq., Solicitor, aged 52.
- 14th. VIGURS, Louis, Esq., Barrister-at-Law, aged 54.
- 13th. DRYDEN, Erasmus H., Esq., Solicitor, aged 47.

THE
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No. LX.

ART. I.—THE GAME LAWS JURISPRUDENTIALLY
CONSIDERED.*

BY EDWARD WEBSTER.

RECENT events render a consideration of the game laws on jurisprudential principles very opportune, for it may be predicated from the great interest which has been manifested by agricultural associations with regard to those laws, and from the disputed views amongst the co-partners of the soil concerning them, and from the agrarian demand for their abolition, not only that the game laws cannot long remain as they are, but that animosities in connection with them can never be permanently allayed, until they have received from the Legislature a consideration, based on the just rights of property, and the consequent welfare of the community. It is an indisputable fact that the Legislature, when bringing into existence the game laws, whether those formerly or whether those now in operation be regarded, has proceeded on principles purely arbitrary, for whilst inflicting severe penalties for the unlawful pursuit of game, no property in it has been created, and jurisprudence, which is scientific legislation, cannot exist without a law of property founded on

* A paper read at a meeting of the Juridical Society.

what is morally right,* or, where there is no property, without *primâ facie*, permitting the full enjoyment of natural liberty. Jurisprudence sacredly regards the lawful exercise of all natural rights, but she regards them with reference to the common welfare, and therefore is justified, if, and when, the welfare of the State requires their restriction, in restraining the exercise of them. For example, no Legislature is justified in qualifying the natural right to pursue and capture wild animals, except for the purpose of putting in operation a higher principle of jurisprudence. The rule is well expressed in the following language—

“ Though the civil law can enjoin nothing which the law of nature forbids, nor forbid anything which that enjoins, yet it may restrain natural liberty and prohibit what was naturally lawful, and consequently by its own authority may prevent and hinder that property and dominion which might otherwise be lawfully obtained.”†

The game laws are, at present, generally regarded with sentiments of discontent. In the homely but forcible language of the tenant farmer, they are not unfrequently spoken of as “ the curse of the country.” These sentiments of discontent vary, and are divisible as follows :—(1st,) Sentiments founded on self-interest. (2ndly,) Sentiments in their nature agrarian. (3rdly,) Sentiments founded on jurisprudential considerations ; and (4thly,) Sentiments founded on expediency.

From self-interest the cultivator of the soil, whether there be an agreement reserving the game or not, desires to have vested in him an absolute and exclusive property in it, the effect of which would be to give him a monopoly of one field sport, and the great pecuniary advantages obtainable from that monopoly. On the other hand, landlords from the same motive, many of them at least, desire to have a similar property, not only to be able to continue their present exclusive right of

* *Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.*—Just. Inst., Lib. I., tit. 1.

† Puffendorf, Book II., c. 2, s. 57.

shooting, but to assign that right in order to receive two rents from their land, one derived from the farm stock, the other from the game.

The sentiments secondly before described are entertained by very many, indeed by the mass of the people, many of whom become almost frantic when a restriction on any natural right to pursue and capture wild animals is mentioned; and their prejudices are so strong, that even their parliamentary representatives are capable of placing game (which affords in abundance human food) in the same category as the carnivorous and predatory animals.*

In the presence of persons entertaining either the first or second class of the foregoing sentiments, jurisprudence wisely remains silent, pointing to justice, and the laws of property and order.

It is expedient at this stage of my observations, with a view to scientific legislation, to classify certain wild animals, including fish, as follows:—

Class 1.—*Feræ naturæ*, graminivorous, granivorous, or in confinement, also fish in confinement, viz., hares, rabbits, deer when in confinement, pheasants, partridges, wood pigeons, larks, landrails, quails, and their eggs; pond fish, and their spawn†, and shell fish in artificial beds.

Class 2.—*Feræ naturæ*, carnivorous, vermivorous, or insectivorous, and fish not in confinement, viz.—eagles, hawks, crows, jays, magpies, wildfowl, woodcocks, snipe, water fowl, not domesticated, fish in fresh water streams and their spawn, foxes, badgers, &c.

Class 3.—*Feræ naturæ*, found on wild land, that is, on moors and in forests, on which at present there is a restricted right to pursue and capture them, viz.—red deer, roe deer, grouse, moor game, that is, black game, ptarmigan, bustards, and their eggs, and the animals in Classes 1 and 2, when on

* For example "Tigers." See *Journal of the Social Science Association* 1869, pp. 383, 384, 385, and 386.

† The spawn of fish is mentioned because, thanks to the progress of man's intellect, it has become an important article of trade.

wild land, and the eggs of the birds in Class 1 when on wild land.

So far as the pursuit, or the pursuit and capture, of any of the foregoing creatures is restricted by law, the law is statutory, consisting of Acts of Parliament commonly known as the game laws, though to many that expression conveys an idea confined to the preservation, especially against night attacks, of certain specified animals ; but as the jurisprudential principles, on which laws for the preservation of wild animals should be founded, are now alone intended for consideration, those Acts of Parliament are not enumerated, nor is it necessary to refer to their provisions, except for the purpose of observing that under the word "game," owing to the provisions of 1 & 2 Will. IV. c. 32, s. 2, hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards are commonly considered as included. Rabbits, therefore, are not strictly game.

There is at present no property in game. The words of Lord Chelmsford in the case of *Blades v. Higgs and another* (*Law Journal*, H.L.C., N.S., Vol. XXXIV., parts 2-4, p. 291), may be regarded as an unassailable declaration of the law. "With respect to wild and unreclaimed animals," observes his lordship, "there can be no doubt that no property exists in them so long as they remain in a state of nature." And again, "Animals *feræ naturæ*, when killed, or reduced into possession by the owner of the land where they are found, or by his authority, become instantly his property." In this respect our law and the civil law are alike, for by the latter property existed only in animals capable of being identified.* Nevertheless our law prescribes when, where, and by whom game can be lawfully captured, and exacts obedience by severe penalties, some of them personal. To an infringement of the game laws a name of uncertain origin, and not denoting any moral offence, is given, a name distinct from felony and all varieties of felony—that name is "poaching."

* Just. Inst., Lib. II., tit. 1, s. 12.

The game laws, therefore, do not prohibit what is wrong, nor, upon any jurisprudential principle, command what is right; but are simply laws of terror, which any subject may, without any moral offence, and therefore without any compunction, transgress. If all our laws were founded and enforced on the same principle, we should be living under a military government, we should be in a state of servitude. Fortunately our game laws are the exception, for though it might be difficult, and even impossible, to prove that many of our laws are founded on natural justice, yet all, save the game laws, it is believed, are founded on some right of property, the result of custom, or conferred by the Legislature.

The first question under the foregoing circumstances is, whether so long as there is no property in game recognised by law, it is jurisprudentially right, to have penal or any laws restricting the pursuit and capture of it? To this the answer must be in the negative. No wrong, for example, is done by a person taking possession of land which belongs to nobody,* and so long as he occupies the land of which he has so taken possession, it is his,† and provided he only manures the land it becomes his property.‡

The same principles apply to movable property; § possession being *primâ facie* evidence of ownership; and if, without any contract, labour be lawfully bestowed on movable property, so as to give it an unalterably new character or condition, that makes possession indisputable evidence of the ownership of it; for example, if wine be lawfully made with grapes by one of two persons to whom the grapes belonged, the wine is the property of him who makes it. || Here, it may be asked, how game in a cultivated country is sustained? Can it be alleged truly that it is sustained on food produced by nature unaided by man? Certainly not; for if the

* Puffendorf, Book IV., c. 4, p. 387.

† Siderfin, 347.

‡ Siderfin, 347.

§ Grotius, Book II., c. 3, sec. 3.

|| Just. Inst., Lib. II., tit. 1, s. 25.

ground were not cultivated there would be comparatively no game. Cultivated land consists of arable, pasture, and meadow, each having been made artificially productive by an expenditure of capital, and each requiring a due course of husbandry. Game found on all farmed land, therefore, is propagated from, and exists on, the produce of capital—of capital expended under the sanction of the State. This being so, it is jurisprudentially wrong not to create a property in game on land so cultivated.

As regards, therefore, all indigenous *graminivorous* and *gravidorous* animals, both winged and four-footed, throughout the cultivated parts of the United Kingdom, the law ought, so far as is possible, to give them to the producer of the food on which they live. Who is that producer, will be presently considered. Such a right of property might easily be created, and would be thoroughly intelligible, and easily made operative, if founded upon the maxim "*cujus est solum ejus est usque ad cælum*," the proprietor having liberty to follow off his own soil, but for capture only, game wounded in the exercise of his proprietary right. As regards birds migratory over the sea, in so far as they are sustained on produce the result of capital, the same law of property should exist—therefore quails and landrails, and it may be some other birds, ought to be classed with the indigenous grain-consuming birds before referred to. As regards fish in confinement they ought to be by law, the same private property as is a bird in a cage. As regards birds not sustained on produce the result of capital, it is impossible, on any jurisprudential principle, to confer a property in them, and if, therefore, the natural right to pursue and capture them be restricted the restriction must be founded on a different principle. The principle is contained in the maxim "*Sic utere tuo ut alienum non lædas*." This is a moral obligation which the Legislature has a right to enforce, and which ought to be enforced whenever necessary. This principle is recognized by the Civil Law, for, whilst that law gives no property in wild animals, it recog-

nizes a right in the cultivator of the soil to prevent the pursuit of them over cultivated land. *Plane qui in alienum fundum ingreditur venandi aut aucupandi gratiâ potest a domino si is providerit prohiberi ne ingrediatur.**

The Legislature should, therefore, forthwith create a right of property in the animals enumerated in Class 1, by declaring the unlawful pursuit and capture of them a felonious offence, and the unlawful pursuit of them a criminal trespass, that is, a trespass with intent to acquire another person's property; but as regards the animals enumerated in Class 2, the unlawful pursuit of them should be punishable as a trespass only.

As regards *feræ naturæ* on land that has never been cultivated, (but on which they have been saved from extirpation by the laws at present in operation), that is, on wild land, such as moors and forests, there is more difficulty in arriving at any just law to restrain the natural right to pursue and capture them. Here the law of expediency, that is, purely arbitrary law, meets the jurist; but it by no means follows that such law ought not to exist; for all law that interferes with natural rights is founded on a restraint of natural liberty.† Our land laws, for example, are laws of custom, and it would be impracticable to found territorial property on any other principle without recognising allodial titles, the operation of which in a very few generations would cause a division of the land *per capita*. This would not only destroy the progressive principles of government on which our constitution is founded, but would infect it with retrogression. A greater national calamity than a minute division of the soil could hardly happen. At present the exclusive property in wild and other land is derived directly or indirectly from the sovereign, who never has abandoned his right to the allegiance and duty owing to him as incident to the tenure of it. There is, therefore, no absolute and unqualified title to land, known to our laws,—no allodial

* Just. Inst., Lib. II., tit. 1, s. 12.

† See Puffendorf, Book II., c. 2, s. 5.

tenure. Hence, many persons are from Crown grants entitled to the exclusive enjoyment of wild land, without any labour or capital ever having been expended upon it, and those rights have been unquestioned and transmitted for many generations. It must, however, be admitted on jurisprudential principles, that those exclusive rights ought never to have existed, and that the maintenance of them can be justified only on the arbitrary principle of expediency. Ought they therefore to be abolished? The answer must be, certainly not. First, because it must be presumed that they have been lawfully obtained, that is, with the sanction of the State; and secondly, because the State would lose great advantages by the abolition of them. If, however, that exclusive title, which is founded essentially on what is wrong, can be modified without injury to the proprietor and without damage to the State, the Legislature ought forthwith to interfere. It being a great national advantage to be supplied with food from the *graminivorous* and *ericavorous* animals found only on wild land, it is lawful to preserve them from extirpation, and as the preservation of them for the national benefit can be effected, in no practicable way, except by conferring an exclusive private right to pursue and capture them, it follows that it is expedient and therefore proper to confer such a right, and to protect the enjoyment of it; but, beyond all question, that exclusive right should not be protected by any unnecessary laws. The State ought therefore to authorise the public to enjoy the natural right, except during the breeding season, of taking air and exercise over wild and forest land.

As to fish in the estuaries of rivers, it may be remarked that as no national damage can arise from an indiscriminate right to take them, there is no necessity to restrict that right,* but as regards shell fish in artificially-constructed

* An estuary is a widening of the mouth of a river into an arm of the sea. See Worcester's A. D., word "Estuary." If it be in any estuary, probable entirely to intercept and capture *fluvio-marine* fish, the law should interfere to protect the fluvial proprietors.

beds and fish in rivers above estuaries, each should be protected as before mentioned. The difficulty of enacting a law for the preservation of game founded on property, arises not from the nature of the subject, but from the vexed question who is the producer of the food on which game is sustained, a question which could never arise if the soil were vested in a single proprietor. But wherever land capable of cultivation is limited in extent, and people are increasing in number, and are for a maintenance engaged in other pursuits than the cultivation of land, it is impossible to confine the ownership of land to a single proprietor. The relation of landlord and tenant, or some analogous relation, therefore always ultimately arises where land capable of cultivation is limited in extent, and a resident population is increasing in numbers. This limitation may be natural or arbitrary. In all islands it is natural, but wherever wild land capable of cultivation is, by being vested in an exclusive proprietor, restricted from cultivation, whether in an island or elsewhere, the limitation is arbitrary. The relation of landlord and tenant cultivator in England originally arose from the latter cause; a right to occupy and cultivate land in a wild state being obtainable only from a superior proprietor, who would make his own terms—one of which was to limit the proprietary right of the cultivator to the use of the soil for purposes of husbandry. The rights of the chase were thus monopolised by a single class for many generations, the Legislature defining what persons should be entitled to them. A right to hunt in public with hounds was never in any way restricted, but with that exception, the persons entitled to pursue and kill game were few in number, and belonged to a favoured grade of society. In the year 1831, that principle of favouritism was abandoned, and a right to kill game was given to every one willing to pay a tax, but as the right was rendered incapable of being exercised lawfully without the consent of the landlord,* the effect of the law has been,

* 1 & 2 Will. IV., c. 32, ss. 6 & 7.

and at present is, that game in the absence of any agreement to the contrary cannot be lawfully pursued except by the landlord or with his consent; in other words, the exclusive right to kill game is vested practically in the landlord. This has, recently, in very many instances given rise to a condition of things, not contemplated by the parties when the relation of landlord and tenant first arose. It was always, until recently, understood that the landlord should, did he so choose, be personally in the exclusive right to kill the game and to preserve it, but it was not contemplated that he should assign that right to a stranger, a person standing in a very different relation to the tenant, one between whom and the tenant there could exist no mutual obligations, as regards the payment of rent, the maintenance of farm buildings and the cultivation and management of the land; and who, unlike the landlord, has no interest in keeping down the game sufficiently to enable the tenant to produce sufficient stock and grain to pay his rent. Of late years the privilege of shooting, from its scarcity and the pleasure it affords, has become valuable, representing a considerable marketable price, and many landlords have availed themselves of their exclusive right to kill game by transferring it to others for a pecuniary consideration, thus receiving two rents, one from the tenant, the other from the assignee of the game, the latter being in truth paid by the tenant in addition to his other rent. A more grievous injury to the tenant, a greater practical injustice, cannot well be imagined. It is morally utterly unjustifiable.

It is not surprising, therefore, that great discontent and even indignation should exist amongst the tenant cultivators of land, where game is excessively preserved. It is true the landlord may allege that he might, himself, had he chosen so to do, have preserved the game in the same quantity; and so he might, but had he done so, and had then let the game, he could not have taken, without grievous injustice, the same amount of rent, as if the game were preserved

for his own *personal* enjoyment. Now, beyond all doubt, the landlord and the tenant of cultivated land are both producers, except, in the single instance, of a tenant at his own exclusive expense bringing wild land into cultivation. It may be, it is believed, truthfully alleged, that the expenditure of the landlord on land before it is adapted for cultivation by an occupying tenant, is necessarily full threefold more than that of the tenant, assuming that the landlord provides and keeps in repair the farmhouse and buildings, drains and breaks up the soil, and makes the inclosures. There was, therefore, no absolutely unjust principle brought into operation when s. 7 of 1 & 2 William IV. was enacted, which (except in cases where the right of killing game had been expressly granted or allowed, and except where upon the original granting or renewing of any lease or agreement a fine or fines had been taken, and where the lease was for a term exceeding twenty-one years,) gave the landlords the exclusive right of entering, or authorising another to enter, on land for the purpose of killing or taking game; on the contrary the landlord had far more right to the game than the tenant. The injustice has arisen from the abuse of that statutory privilege.

If the sole object of legislation be to produce the largest quantity of human food, those laws would be the best that, in their result, caused the land to produce and sustain the largest quantity of grain and food producing animals; but game is food, and is therefore *primâ facie* rightfully under the protection of the law. To justify the utter extirpation of game, for the sake of producing other edible animals, it must be proved that, when brought to market, game has consumed of food or destroyed, or both consumed and destroyed of food a larger quantity in proportion to its saleable weight than other stock. This is incapable of proof. The question was fully gone into before the Select Committee of the House of Commons on the Game Laws in 1845 and 1846, and the evidence upon the question is in the very highest degree

uncertain and unsatisfactory. Two witnesses say 2 hares,* another, 3,† another, 4 or 5, ‡ another, 1,§ another, 6, || another, 4, ¶ another, 55,** another, 50, †† another, 16, ‡‡ another, 20, §§ another, 40 ||| hares consume as much as a sheep. The truth is that every animal consumes food in quantity, the same, that is in proportion, to its size and weight. Six pounds weight of hare is, therefore, brought to market at the same cost of production as six pounds of beef or mutton, except so far as the hare has prevented the growth of food by its habits, or by its having had a longer existence than is permitted to animals fatted for market. Hares and rabbits may exist longer than domesticated animals. It is believed that they rarely do, but where they have access to corn crops they, by biting off corn in the blade, to a certain extent destroy without any corresponding advantage cereal produce. The urine of the rabbit is also destructive or pernicious. There are evils inseparable from the preservation of hares and rabbits; ought they, therefore, to be extirpated? Would their extirpation be a national advantage? As regards winged game, for about ten days or less in the year, that is to say, so soon as corn crops are ready for the sickle, that is, so soon as the grain will separate from the ear, winged game in common with other granivorous birds attack standing corn; but they do not destroy corn in the blade. Ought pheasants and partridges, therefore, to be extirpated? Here considerations of State become the ally of the game preserver, for there is a principle of government equally important as that of the mere sustenance of human life, a principle which has been always in operation, and that is, the maintenance of national power. War has destroyed far more lives than famine. Are we to disband our army and cease to maintain our navy, because lives may be lost in war? Are we

* Bates, 43, 45, 157. Gayford, 8676. † Bell, 4007, 4000. ‡ Skittler, 5722. § Morris, 10,260. || Gayford, 8926. ¶ Hobson, 11,864.
 ** Houghton, 1634, &c. †† Hon. G. F. Berkeley, 15, 475. ‡‡ Brierley (1846), 2387. §§ Hooper (1846), 3277. ||| Earl of Malmesbury (1846), 4720.

to abolish all game laws and permit all wild animals to be extirpated, because game may to a certain extent prevent the largest quantity of human food reaching the market, a quantity incapable of being appreciated? Political economy also here becomes the ally of the game preserver, for it can be proved that the growth of human food in the form of game causes capital to be largely employed in productive industry, and its expenditure to be distributed throughout the provinces,—a national good by no means unworthy of the attention of the statesman. It is, therefore, a serious question whether, were game extirpated, the country would be more prosperous.

It is not the first duty of a State to produce in the largest quantities human food, but to maintain the institutions which tend by moral restraint to prevent population increasing beyond its means of subsistence; that is, institutions which encourage forethought and morality—in other words, progressive civilisation. In this point of view it is right and necessary to have laws for the preservation of game, because the social operation of them is nationally beneficial. Field sports induce very many of the more highly educated classes to visit and remain for a considerable time every year in the provinces, where they expend capital in the encouragement of provincial art, and in promoting provincial industry, and where by field sports they are able, not only to occupy agreeably that leisure which has been hardly earned, but to restore, and keep unimpaired, that strength of mind, and those intellectual qualifications, which it is essential for the national welfare some portion of society should always possess. Doubtless the preservation of game to some extent leads to crime, but those who contend there ought to be no game laws, must prove that were game extirpated there would be less crime. Upon this question, the sentiments of ministers of religion, and dwellers in towns, ought not to set up against those of dwellers in the country, many of them inhabitants of isolated homesteads, especially exposed to the invasion of the criminal classes. If landlords and tenant farmers be

consulted, whatever difference of opinion may be entertained as to who should be entitled to the game, they would be unanimous, or nearly so, as to the expediency of having it protected, especially by night, by a rural police, and the fact that poaching may be the beginning of a criminal career, and that murderous fights occasionally are caused by the preservation of game, ought not to be allowed to be set up against the right to have the property of farmers and others resident in unprotected homesteads protected effectually. In this respect, the night poaching Act has been most beneficial,* and it would be improper to repeal it.

The conclusion then derived from the foregoing observations appears to be that jurisprudentially it is right and expedient to enact and maintain game laws, but that those at present in existence ought to be amended, by founding them in part on the principle of property, viz., by declaring that all animals in Class 1, before mentioned, whilst on or over cultivated land, should be the private property of the proprietor, and that the unlawful pursuit of such animals should be a penal trespass, and the unlawful capture of them a criminal offence; and as regards all the animals enumerated in Class 2, that the unlawful pursuit of them should be protected by a law of trespass, and as regards all the animals enumerated in Class 3, that the preservation of them should be secured by making it a penal offence unlawfully to pursue them, especially during the breeding season, but they should not be preserved under the principle of a trespass, because no capital has been expended on the land where they are found.

As regards the private sale of game, notwithstanding the importance of the subject, it is not a question of a jurisprudential nature. The only remaining question is in whom the property, proposed to be created in game, should be vested, with reference to which it may be observed that the first principle should be to leave co-partners on the soil to enter into any contract they please; secondly, that in the

* 26 & 27 Vict., c. 114.

absence of any agreement to the contrary, the property in game ought to belong to the person or persons by whose labour and capital it is sustained. Upon this principle, if any exclusive property is to be created, it should, if there be a plurality of persons whose capital is so expended, be vested in them in proportional shares, as far as is practicable. Here a difficulty of very considerable magnitude arises, which can only be reduced into law by a compromise. Bearing in mind that, as the law is at present, the tenant occupier contracts only for the use of the soil for farming purposes, his landlord being entitled, as against him and every other person, to kill and preserve the game upon it, if the law of contract be strictly regarded, the law ought to vest the game in such cases exclusively in the landlord; but as the effect of that would be to enable the landlord to get, as already demonstrated, two rents from the land at the expense of his tenant, it would seem to be a fair compromise and highly expedient, if the tenant had vested in him the property of all wild graminivorous animals, the property in all granivorous game being vested in the landlord. The result would be that hares and rabbits would be the property of the tenant cultivator; pheasants, partridges, quails, and landrails the property of the landlord; and as regards the killing of larks, woodcocks, snipe, wild-fowl, &c., the right to pursue and kill them might be left to the law of contract.

It should be finally remarked that a law of trespass would be utterly nugatory for the preservation of wild animals. A law of trespass confers a right of action only, and most of those who would be engaged in the unlawful pursuit of game would be unable to pay the legal expenses of an action. A law of arrest, especially by night, is, therefore, essential for the preservation of game. Where it is, notwithstanding its migrations from farm to farm, in truth and in fact sustained on the same food as live stock fatted for market, the law ought to afford the same protection, as far as is possible, to

those at whose expense game is in existence ; but there is an unreasonable demand for the abolition of all game laws ; let this demand be met by placing before the public the simple principles of natural justice. Natural justice requires that they who, by the expenditure of capital, produce a marketable article would participate in the profits. Let, then, in cases where there is no agreement to the contrary, the ground or graminivorous animals be declared by law to be the property of the tenant, the winged game the property of the landlord. Should this just and reasonable principle not soon be acted upon, it may be that there will be soon no game laws at all. Matters of trespass and police, with a view to any enactments concerning them, are not considered on the present occasion, they not being strictly jurisprudential subjects. It is sufficient to observe with regard to them, that in every highly civilized and well-governed State, there is no difficulty in framing laws for the protection of rights created by its Legislature, and if and when necessary in enforcing the observance of them.

ART. II.—EARLY ENGLISH CODES.

(1.) THE MIRROR ; (2.) LEGES HENRICI I.

IT is proposed to discuss in the following article, the authenticity and the worth of certain ancient legal treatises, which have lately been cited as of great authority, and emphatically vouched to contain much trustworthy information, both as to the history of this country in remote times, and as to the sources of our Common Law.

Somewhat encrusted—over much perhaps—*rubigine vetustatis*, such treatises have nothing about them attractive

to the general reader, and but little that is useful even to the professional student, and yet, in the history of the development of our liberties, they may have an infinite importance as links in the long chain of our national records, as ancient title deeds of our present freedom, which may at least merit an occasional reference, and justify an endeavour to awaken a passing interest in the genuine, and to point out and displace the worthless.

It can hardly be rash to affirm that a critical examination of the early law books and judicial records, with a design to eliminate

. . . *il troppo ed il vano,*

should be the first object of the codifier, and that to set about re-arranging the practice and the functions of the judiciary, before we have obtained the scheme of the future Code—which is the plan adopted by our highest legal officer—is very like beginning at the wrong end. But be this view right or wrong, it cannot but be necessary to the compilation of a reasonably satisfactory Digest to ascertain what are, and what are not, the pure sources of the law. With these observations we will proceed to discuss the treatises referred to, taking them in the order of their popularity.

The Mirror appears to stand first on the list. It received from Lord Coke (see preface to the 9th and 10th Reports) the most emphatic commendation, and it has recently been highly eulogised and abundantly cited by Mr. Finlason in his new edition of “Reeves’ History of the Law,” and described by him as a work “more illustrative of our whole legal history for the period from the Saxon monarchy to the Great Charter than any other work extant.”* We may add that it was also cited in the recent case of *Tatton v. Darke* (5 H. & N., 647), and relied upon by the Court, the late Lord Chief Baron Pollock having been reported as saying that it was written in the time of King Alfred (see 29 Law Jour. Exch., p. 271).

* Reeves’ Hist. C. L., Vol. I., note to preface.

Unfortunately, the Mirror is one of the most questionable authorities extant, as we shall show. Meanwhile, a word as to Lord Coke's commendation. It must be remembered that in his time philosophical criticism, of either law, or history, or scientific writings, was practically unknown, and an almost blind reliance on precedent, (which even Lord Coke himself reprobates,*) was the confirmed habit of both Bar and Bench. Whether these precedents were genuine or not was rarely, if ever, considered; it sufficed that they were, or purported to be, ancient, and supported the opinions of the person citing them. Some curious instances of Lord Coke's lack of critical judgment will be seen by referring to the citations in the note below, and, we are afraid we must say, of his occasional recklessness in the use of records for the purpose of supporting his statements.† We ought nevertheless to add, *quoad* the references to certain of his works, that they were posthumous publications.

We shall now give some account of this ancient treatise.

The Mirror is what may be called an ambitious work, professing to be a *Summa* or abridgment of English law from the days of King Arthur to those of Edward I., and such as Vacarius and some of the most distinguished of the doctors of Bologna had previously compiled with reference to the civil law. It affects to give circumstantial accounts of particular ordinances and judgments of King Alfred (Mr. Finlason says that it contains his long-lost *Dom-boc*), it attributes to this monarch the institution of trial by jury, and narrates in chronicle-like style a strange story of his hanging forty-four judges, and many other curious facts which are not mentioned or referred to in the life of King Alfred by his cotemporary, Asser, or in any record of a trustworthy character. It further acquaints us with some details concerning the independence of the clergy of control by the secular

* Preface, 10 Rep., xxi.

† Co. Litt., 68, b., extract from Leg. Ed. Conf. Selden, tit. Hon., part 2, cap. 5, s. 26. Preface to 3 Rep. Per Anderson, O. J., 2 Sid. 200 per Cur. Cam. Scacc., Kel, 21; per Prynn, Brev. Part., Pref., 4 part. ‡

courts in the time of King Edward I., which are not narrated by other writers; and, *inter alia*, it tells us that the ancient and accustomed punishment for *heresy* was burning, as to which again there is no independent proof whatever.

This remarkable work appears to have remained neglected and unknown to the profession until the apparent discovery of a MS. of it by Lord Coke after the publication of the 8th Reports, for no mention is made of it by him in his elaborate prefaces to the third and eighth volumes, wherein he enumerates the various legal authors of high repute. In his preface to the 9th Reports he commences by alluding to it as "a very ancient manuscript in my possession."

It was first printed in 1642 from "an old MS. belonging to Francis Tate, Esq.," collated with another in the possession of Corpus Christi College, Cambridge. Notwithstanding its distinguished introduction to the legal world, it seems to have excited immediate suspicion. Fulbeck,* for example, never mentions it in his well known "Study of the Law."

Of the next generation of lawyers and law writers, Lord Hale, as illustrious an antiquary as a lawyer, makes no use of it either in his "History of the Law," or in his more critical work on the "Pleas of the Crown," and this is the more remarkable, considering his evident conviction that to the Anglo-Saxons we owe the greater part of the elements of the law. There are some omissions, which appear to us manifestly intentional: see Hale, Pl. Cr., c. 11, and c. 30; compare Mirror, c. I., s. 4, and c. IV., s. 14.

After Lord Hale's time, the Mirror received some attention and examination from the celebrated Dr. Hicks, perhaps the most learned Anglo-Saxon scholar of his day, and any one who will take the trouble to refer to his laborious investigation of the truth of one of the statements in the Mirror,

* A cotemporary of Lord Coke's. The preface to 9 Rep. was written about 1612, Fulbeck's Study of the Law about 1620: Bridgman, Leg. Bibl. Sir Thomas Egerton and Lord Eldon both held a high opinion of this work by Fulbeck.

which is to be found at p. 42 of his "*Dissertatio Epistolaris*," will feel but little surprised at his calling Horne, in one passage, *falsarius aliquis Horno*, and, in another, at his speaking of the work attributed to him as *quo nihil mendacius*; or if the trouble should be too great, we venture to say that a moderate acquaintance with Anglo-Saxon names, and a cursory reference to and comparison of the semi-Frankish concoctions in the Mirror, will enable any intelligent person to see why Dr. Hicks used such strong language.

An analysis of this composition leads us to attribute it not to Horne but to some unknown lawyer, long posterior to the reign of Edward II. The elaboration of the reasons for this opinion would occupy too much of the space of this review, but we may mention one little bit of internal evidence which is very cogent. It will be seen that among the causes assigned, in Chapter III., section 6, for *exception* to the jurisdiction, is the following:—"That the writ is written on PAPER [Fr. *papier*], or parchment, which is prohibited." Now paper, in the reign of Edward II., was an *article de luxe*, entirely of foreign manufacture, and, with the exception of a very few royal letters and documents, most, if not all, of which were written abroad, was unknown in England; but there are extant writs to the sheriffs of the reign of Richard II. written upon paper, and enrolled among the public records, which are believed to be the first official employment of this material, and we do not find any authority before the time of Lord Coke* for the statement that paper was prohibited in legal proceedings.

We will now turn to the *Leges Henrici I.* These will be found printed in the Record Edition of "*Ancient Laws and Institutes of England*," which was published in 1840. They are taken from the Red Book of the Exchequer, which is unquestionably of great antiquity, and has often been "admitted in the Court of Exchequer as evidence for certain

* See Co. Litt., 260 a. 2 Roll. Ab., 21. Note also that paper is spelt, not *papier*, but *papire*, in 4 F.R., p. 176: *temp.* 1 Hen. VI.

purposes." * These laws, somewhat like the Mirror, profess to be a code for the entire kingdom, and they are divided into paragraphs and subsections in a most systematic way.

Lord Hale frequently refers to them; Mr. Hallam† attributes them to a compiler in the reign of Stephen, and has made many citations from them; and lastly in the new edition of "Reeves's History," already mentioned, we find them repeatedly and largely quoted, and Mr. Reeves taken severely to task for omitting to make use of them.

Now what are these *laws*? We must first separate the Charta of Henry I. from the laws. The Charta probably is genuine, being found in the Textus Roffensis, which, it is generally agreed, was written between 1115 and 1125; but the laws, of which the only copy of so early a date as the reign of Henry III. is in the Red Book of the Exchequer, are not in the Textus Roffensis. They commence with a paragraph headed *De Causarum Proprietatibus*.

One thing we think is clear, namely, that it is impossible to assign an earlier date to them than the reign of Henry II.; for, first, the "Decretum of Gratian," (not published in Italy until 1151,) is mentioned in this treatise, which sufficiently shows that the work was not compiled under Henry I., and taking into consideration this date so established, and the disturbed state of the country under Stephen, we may safely conclude that this compilation was not effected under *that* king; secondly, it is the opinion of a great scholar and painstaking critic, Mr. Sumner, for which he cites authorities, that this code could not have been constructed until the eighteenth year of Henry II.; this opinion is founded upon the internal evidence of the document.

For our own part we consider that it was not compiled until after the eighteenth year of *Henry III.*, for the following reasons;—according to Mr. Madox's statement (founded on much careful research), in the "Dissertatio Epistolaris,"

2 Hallam, *Med. Ages*. Note xi., p. 413, 11th edition.

† 2 Hallam, *ibid.*, 337 & 386.

printed at the end of his "History of the Exchequer," the Red Book was compiled by one Alexander de Swereford, a canon of St. Paul's, and he, it is shown by Mr. Foss, was not appointed until 18 Hen. III. to the charge of the records of the Exchequer.* This fact, taken in conjunction with what we may infer from several passages in the *Leges*, quite inconsistent with the constitutions of Clarendon, but not at variance with the subsequent claims and usurped rights of the clergy in the reign of Henry III., tends to place the date of this collection of laws 'about the year 1230,† that is to say, one century after their commonly ascribed date.

In aid of the above surmise, we add the following extract from Bracton, who probably commenced his voluminous commentary about 1230:—

"Fere in omnibus regionibus utantur legibus et jure scripto, sola Anglia usa est ut in suis finibus jure *non scripto* et consuetudine."

It being impossible to ascertain what were the materials of which the author availed himself, we must trust to analysis for the purpose of ascertaining the worth of his compilation. The first thing that we feel struck with is the horribly bad Latin of the text; next, the use of the first person singular in some of the sentences in a tone of apology (see cap. 8, *ad fin.*) for not having set forth "the laws of King *Edward the Confessor* in a more complete manner, as they merited," to which succeeds the expression of the hope that "these *capitula* have taught something worthy of attention to *our profession, sive jure naturali, vel legali, vel morali*," although, "as is admitted, in the various parts of the work, a great many laws have been omitted." (!) And there are other places, *ex. gr.*, cap. 5, s. 31, where the pronoun *tu* is used, and cap. 6 (unfortunately almost altogether unintelligible), where the confused state of the laws is in equally confused language

* See "Foss's Judges," *Alexander de Swereford*.

† This is, in fact, the date given by Swereford himself in his preface to the Red Book.

inveighed against, from which it is manifest that the compiler considered himself rather a commentator than a codifier. And lastly, when we examine the *substance* of this singular composition, we find it made up of citations from St. Augustine, from St. Jerome, from the *Leges Salicæ*, from the *Leges Longobardorum*, from the *Leges Wisi-gothorum*, from the Theodosian Code, from the Frank Capitularies, and from the canon law, as well as from what are supposed to be Saxon laws.

Under these circumstances we feel inclined to disbelieve in these laws as "historic verities," and to agree with what seem to have been Lord Hale's second thoughts,* that they are "but disorderly, confused, and general things, rather the cases and shells of directing the way of administration, than institutes of law." At the same time we cannot regard them as valueless, nor can we hold them to be a mere literary figment of the time in which they seem to have been written, for they bear important evidence of the desire of the compiler to recover the wreck of the old Saxon laws, and put upon record some memoranda of the institutions which seemed fast giving place to the great, new, and overwhelming feudal system of the Norman kings, and to struggle against the introduction of its concomitants, foreign law, and the influence of Italian ecclesiastics: such we know, from the passage from the "*Opus Majus*" of Roger Bacon, so often quoted, was the earnest desire of many an English monk and scholar; and if the record be imperfect, we may attribute it to a prior and contemptuous obliteration and intentional neglect in the Norman Exchequer of the memorials of a past that was dear to the Anglo-Saxon.

It has recently been conjectured by a German writer on Anglo-Saxon law, that these laws ascribed to Henry I. may have been copied from an old Latin version then extant; but we think not. The internal evidence of this most miscellaneous composition,—certain expressions in it which indicate

* Hist. C.L., p. 137. 4th edition.

oral sources of information,* the frequent reiterations and contradictions,—the silence of Alexander de Swereford, in his preface, on this subject, are altogether against such a supposition. The probability is rather that Swereford gathered from various sources an undigested mass of information about the laws and customs of ancient times, which he felt to be both fragmentary and discordant with Norman ideas of government,† and which he patriotically endeavoured to rescue from impending oblivion, by giving it the form and appearance of a code, with the aid of abundant interpolations from codes and capitularies.

The result is, that we have before us an inextricable medley which cannot represent the true state of the law in the time of the first Henry, giving us no really useful information about the ancient provincial customs which governed the rights and privileges of the ancient Anglo-Saxon communities and their members *inter se*, and in relation to the king, which customs form the very groundwork whereupon our Common Law is based.

ART. III.—THE LATE SIR FREDERICK POLLOCK.

THE career of some men who have eventually attained eminence, has been distinguished and rendered interesting by the vicissitudes of their course, and the many and varied obstacles which they had to overcome ere reaching the goal at which it was their steadfast aim through life ultimately to arrive. The career of the subject of the present memoir was distinguished, if we may so term it, by the singular and unvaried prosperity with which he met through life. At school, at College, at the Bar, and on the Bench, one

* See cap. 8, *ad fin.*; cap. 76, and cap. 90, s. 11.

† See particularly cap. 9, s. 9.

uniform success attended him. It was his further good fortune, the consummation of a successful career, to live respected and beloved by all who knew him. Even envy, which seldom fails to raise up enemies to those who excel other aspirants in the same race, was wanting in this instance; and not a man was to be found who would have desired to do an injury to the late Sir Frederick Pollock.

To commence with his very earliest career, the late Sir Frederick Pollock was born at his father's house in the neighbourhood of Charing Cross, in the parish of St. Martin's-in-the-Fields, on the 23rd of September, 1783. His father, Mr. David Pollock, who was a native of Scotland, kept a saddler's shop, and was very successful in business, not only securing royal patronage as a tradesman, but what is considerably more important, deriving large emolument from his calling, so that he was able to give to each of his sons a finished education; he was besides a man of great integrity, and was universally respected. His wife was Miss Sarah Parsons, who, we are told, was a person of remarkable energy and force of character. By her he had a family, and three of their sons attained high eminence in their respective professions. The eldest of them was the late Sir David Pollock, Chief Justice of Bombay. Another was Field-Marshal Sir George Pollock, the hero of the Khyber Pass and of Cabul. The second son of Mr. Pollock was the subject of the present memoir.

Frederick Pollock, before being sent to a public school, was placed under private tuition, but at the age of 15 or 16 he was entered at St. Paul's School, of which the Rev. Dr. Roberts was at that time the high master. This school has been eminently successful as regards its production not only of scholars, but of men who have distinguished themselves in after life. Thomas Wilde, afterwards successively Chief Justice of the Common Pleas and Lord Chancellor Truro, was, we believe, a contemporary of Frederick Pollock at St. Paul's, and we know that he maintained an intimacy with

him through life. The late Bishop of Manchester, Dr. Prince Lee, and the present Bishop of Llandaff, Dr. Ollivant, both men highly distinguished for their scholastic acquirements, were also educated at St. Paul's School, under its late admirable and worthy high master, Dr. John Sleath, who delighted to greet the appearance, at the annual apposition, of Mr. Frederick Pollock, Q.C., M.P., then a very rising barrister, destined eventually to secure high promotion, as we have heard the learned doctor himself predict. At school young Pollock was distinguished above his contemporaries both in classics and mathematics. In 1802 he entered at Trinity College, Cambridge, where he brought with him a high reputation from St. Paul's, but which he not only fully maintained but increased. He not merely came out first in every successive college examination, but in 1806 he closed a very brilliant under-graduate career by going out as senior wrangler and first Smith's prizeman. The following incident connected with the exhibition of the degree-list was related by the late Sir F. Pollock, and is given in nearly his own words.

"I was very anxious as to my place in the list, and, at the same time, rather confident. Perhaps my confidence bordered on presumption; if so, it was deservedly punished. As soon as I caught sight of the list hanging in the Senate House, I raised my eye to its topmost name. That name was not mine. I confess that I felt the chill of disappointment; the second name was not my name, nor yet the third, nor yet the fourth; my disappointment was great. When I read the fifth name, I said, 'I am sure I beat that man.' I again looked at the top of the list; the nail had been driven through my name, and I was 'Senior Wrangler.'"

In 1805 Mr. Pollock was elected to a Fellowship of Trinity, and subsequently took his degree as M.A. He afterwards entered as a student at the Middle Temple, and was called to the Bar in Michaelmas Term, 1807, one year before his great rival on the Northern Circuit, Henry, afterwards Lord Brougham. He became constant in his attendance in Westminster Hall, where his abilities and industry were at

once appreciated, and he soon rose into practice. Before he had been quite three years at the Bar, his reputation was widely extended by his conduct of the case of Admiral Blake, on the trial of Colonel Arthur, charged before a court-martial with implication in a rebellion against the admiral while Governor of New South Wales. In the summer of 1810 Mr. Pollock joined the Northern Circuit, which Mr. Brougham had already done; but this year he went no farther than York. In the summer of 1811 he went all round. He does not, however, seem to have met with any great encouragement there, as he did not again go the circuit until 1815, and then only to York. But he went all round the circuit in the spring of 1816, and continued to do so regularly from that time. Mr. Brougham was then in good practice on the circuit, as were also Mr., afterwards Sir James, Scarlett, and Mr. Serjeant, subsequently Baron, Hullock.

Mr. Pollock's practice both in Westminster Hall and on the circuit continued to increase, and early in 1827 he was appointed one of His Majesty's Counsel, in conjunction with Mr. John, afterwards Lord, Campbell, and Mr. John Williams, subsequently one of the judges of the Court of Queen's Bench. Mr. Brougham had received his silk gown about a week previously. Mr. Scarlett, who had been for some time the leader of the Northern Circuit, quitted it in 1827, in consequence of which, not only was a large amount of business thrown into the hands of his late colleagues there, but a keen contest for the lead at once commenced. In point of seniority Mr. Brougham was entitled to this honour; but in point of actual practice Mr. Pollock might claim the distinction. He was much employed in great mercantile cases, both on the circuit and in London, especially at Guildhall, where interests of considerable magnitude were involved. And masterly was the manner in which he grasped the details and applied the law in trials of this description. While Mr. Brougham continued on the circuit, which he quitted for the woolsack in Michaelmas Term, 1830, the forensic contests between him and

Mr. Pollock were frequent and severe. We have it, however, in the words of the late Chief Baron, contained in a letter to the writer of the present memoir, that vehement as those encounters were, they were always conducted in that spirit and manner which are becoming, and we may doubtless add generally characteristic of, high-minded British advocates.

“It is very creditable to Brougham (and I may claim some share in the credit), that during the whole time we were opposed to each other, not one syllable of disrespectful language ever dropped from either of us to the other, nothing that either could wish unsaid; and his conduct on the woolsack was as kind and friendly as possible.”

The able writer of the memoir of Sir Frederick Pollock, which appeared in the *Times* shortly after his death, remarked of him with great justice, that:—

“His success was owing not so much to any showy qualities or attractive powers as a speaker, for these he never possessed, as to the extraordinary reputation for industry and general ability which had followed him from Cambridge to London, and from London to the great cities of the north, supported and confirmed as it was by the accurate and extensive legal knowledge which he displayed on every occasion on which his services were called for. Hence he had many clients from the very outset, and never knew what it was to sit waiting for a brief. His business in the courts of Westminster, always select and lucrative, grew more and more extensive, and after a successful practice of some twenty years he obtained the well-earned dignity of a silk gown, being made a King's Counsel in 1827. From this time forward his progress was still more rapid than before; for many years he engrossed the leading business of his circuit, and found himself retained in nearly every cause of importance. ‘Attorneys and suitors,’ says one who knew him well at this period, ‘alike thought themselves safe when they had secured his services, and not unfrequently were left lamenting when they were told that their adversaries had forestalled them.’”

During the year 1830, on a vacancy occurring among the judges of the Court of Common Pleas, Lord Lyndhurst, who

was then Lord Chancellor, sent for Mr. Pollock, and offered to appoint him to the vacancy, which he, however, declined. The Chancellor then asked Mr. Pollock if he thought that Mr. Alderson would like the appointment, and authorised him to offer it to him; on which he at once went to Mr. Alderson's house, and sent him back to the Chancellor in his, Mr. Pollock's, carriage, when Mr. Alderson forthwith accepted the office, but was afterwards transferred to the Exchequer by Lord Brougham. The above narrative we had from the late Sir F. Pollock, and give it nearly in his own words.

Like most successful men at the Bar, Mr. Pollock was desirous of obtaining a seat in Parliament, and accordingly became a candidate in the Conservative interest for the borough of Huntingdon at the general election in 1831, where he was elected, and by which constituency he was again returned in 1833. He was not, however, so successful as a debater in Parliament as he was as an advocate at the Bar, which may be partly accounted for by his time and attention and energies being so entirely engrossed by his extensive practice at the Bar, and partly by the circumstance that he was nearly fifty years old before he obtained a seat in Parliament. He possessed, however, considerable influence there, to which his high character, commanding talents, and gentlemanly manners, alike contributed. But as an orator he certainly did not shine, although on particular occasions when constitutional topics were under discussion, he addressed the House with great force and effect. He was also very serviceable in the support of several important measures which were passed through the House of Commons while he had a seat there. On Sir Robert Peel's accession to the Premiership in 1834, Mr. Pollock was selected by him for the office of Attorney-General, which offer he accepted, and was re-elected by his constituents at Huntingdon without opposition, and on this occasion received the customary honour of knighthood, and quitted for ever the Northern Circuit, where he had attained and maintained the undisputed

lead. This must have been a serious loss to him in point of emolument, as his tenure of office was but brief, Sir Robert Peel and his ministry, in the face of a decided majority against them in the House of Commons, resigning their places early in the Session of 1835, and etiquette not allowing of Sir Frederick Pollock returning to the circuit after having held the post of Attorney-General. In Westminster Hall, however, his practice was very extensive, especially in great mercantile cases, and he was specially retained in several leading trials on the different circuits. One of the most important of these was the indictment against John Frost for high treason, which took place under a special commission at Monmouth, in the course of the year 1840. Sir Frederick Pollock was engaged to conduct the defence, and applying his vast legal knowledge and great abilities to the support of his client's case, he was so far successful in what appeared to most persons a legal forlorn hope, that there can be no doubt the prisoner's life was spared in consequence of the doubts thrown by Sir Frederick Pollock's reasoning upon the strict legality of his conviction, and the delays occasioned by the trial being removed to Westminster Hall, and the arguments there before the assembled judges. The case referred for the opinion of the fifteen judges was as follows:—

On a trial for high treason, it was objected that after the jury had been charged with the prisoner, but before the first witness was examined, the prisoner had had no list of the witnesses delivered to him, under the Statute 7 Anne, c. 21. It appeared that the indictment was found on the 11th December, and that on the 12th a copy of it, and of the panel of the jurors intended to be returned by the sheriff, were delivered to the prisoner, and on the 17th December the list of witnesses was delivered to him. The prisoner was arraigned on the 31st December. The objection raised by Sir Frederick Pollock to the delivery of the list of witnesses was that the copy of the indictment and the list of jurors and witnesses should have been all delivered at the same time, *simul et semel*. It was held by

a majority of the judges, after hearing Sir John (afterwards Lord Campbell), the then Attorney-General, in reply to Sir Frederick Pollock, that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection to the delivery of the list of witnesses was not made in due time; and the judges agreed that if the objection had been made in due time, the effect of it would have been a postponement of the trial in order to give time for a proper delivery of the list. It may be interesting to record that the understanding was at the time that Lord Denman, C.J., Chief Justice Tindal, Lord Abinger, C.B., Mr. Justice Bosanquet, Baron Gurney and Mr. Justice Maule, were of opinion that the objection to the delivery of the list of witnesses was wholly unfounded; and that Baron Alderson, Mr. Justice Coltman, and Mr. Baron Rolfe (afterwards Lord Chancellor Cranworth), were of opinion that the delivery of the list of witnesses was not a good delivery in point of law, but that the objection was made too late. Mr. Justice Littledale, Baron Parke, Mr. Justice Patteson, Mr. Justice Williams, Mr. Justice Coleridge, and Mr. Justice Erskine, were of opinion that the delivery of the list was not a good delivery, and that the objection was taken at the proper time. Frost's sentence of death was accordingly commuted to transportation for life. He has, however, we are informed, since returned to the land of his nativity, and is now living, a peaceable and quiet subject we trust, near the scene of his turbulent exploit.

In 1841 Sir Robert Peel returned to power as prime minister, and Sir Frederick Pollock was at once reinstalled in his office of Attorney-General, having as his colleague as Solicitor-General, Mr., afterwards Sir William, Follett. The Attorney-General was on this occasion re-elected by his old and attached constituents at Huntingdon.

In the year 1844, Lord Abinger, the Lord Chief Baron of the Exchequer, formerly Sir James Scarlett, and an old friend and colleague of Sir Frederick Pollock on the Northern Circuit, died after a short illness, being suddenly seized

while on the circuit. The vacancy thus occasioned was at once offered by the prime minister, Sir Robert Peel, to his Attorney-General, Sir Frederick Pollock, who accepted the appointment, which was forthwith conferred upon him, and he was sworn a member of the Privy Council. No question has ever been raised as to his excellence as a judge, to which his extensive knowledge of the law, sound judgment, admirable temper, and uniform courtesy alike contributed, and he was most assiduous and regular in the discharge of his judicial duties. As his biographer in the *Times* well remarks :—

“Perfectly versed in all the antiquated refinements of old-fashioned special pleading, he saw with contentment a new and improved system take its place in 1852, and recognised in the latter the natural corollary of the changes introduced into the process of the courts by the County Courts Act of 1847. But, Tory as he was, he never allowed either the one measure or the other to interfere with the discharge of his duty, or to shock his personal and professional preference for the system to which he had so long been accustomed. His leaning was ever to the side of substantial justice rather than to mere technical accuracy ; and, while sensible of the scientific value of the latter object, he never allowed it to interfere with the higher claims of the former. To this desire of securing the triumph of right and the punishment of wrong must be attributed that apparent readiness to take a side which has sometimes been brought against the departed judge by captious critics ; but even in this failing, if such it was, he ever ‘leant to virtue’s side ;’ and if, in his anxiety to place the salient points of a case well before a jury, he was sometimes led to sink in a measure the Judge in the Advocate, it must be owned that his charges were for the most part as solemn and impressive as they were clear and effective. For instance, during Müller’s trial, it will be remembered by all who were present how his emphatic eloquence moved the deepest feelings of the audience, among whom every sound was hushed, and every nerve was painfully strained as the full force of some apparently trivial point of evidence was pointed out and its bearing explained to the jury, on whose verdict

hung the life or death of the criminal. In a different way his dealing with the *Alexandra* case was equally noticeable. Though repeatedly pressed to do so, he refused to sign a bill of exceptions to what he had not said, or to certify that he had directed the jury in words which he had never used. The result was that the Crown lawyers were defeated and the prosecution failed. The name of Sir Frederick Pollock may not go down to distant posterity as one of the great original lawyers of the nineteenth century, but his memory, as a man and as a judge, will long be cherished with affection and respect by the legal profession. His name is linked with no one great legal measure, no important judicial change ; but it will long furnish an incentive to the diligent study of the law, the upright and honourable practice of legal labour, and the persevering and successful pursuit of its rewards."

There can be no doubt indeed that Sir Frederick Pollock was not entirely exempt as a judge from the failing here referred to, if failing it may be termed, especially common to those who have been distinguished by their success at the Bar—that of being unable entirely to throw off the advocate while acting as a judge, and perceptibly inclining to one side or other of the case, according as the merits appear to him to lie, instead of impartially holding the balance, and leaving the jury to decide the matter entirely according to their opinion. It cannot be denied, however, that this disposition of the judge is, in many cases, productive of substantial justice, as his great experience and knowledge of the law may often prevent the jury from being led astray, or prejudiced by circumstances connected with the case. This was a characteristic of his predecessor Lord Abinger, although it was a remarkable circumstance connected with his judicial career and character that, though he was so eminently successful while at the Bar in leading a jury, he failed to carry the same success with him while on the Bench.

It has also been well remarked that—

"There were two characteristics about the behaviour of Sir Frederick Pollock on the Bench which no one could mistake—his

extraordinary gifts and the extreme kindness and even tenderness of his nature. Nevertheless, when fairly roused, in a case which put him on his mettle, he would speak with a vivacity, a choice of language, and a dignity and force of manner which recalled the old leader of the Northern Circuit in its best days to those who had known him before he was a judge."

One learned serjeant, who has frequently practiced before him, and who, in addition to his high qualifications as an advocate, possesses a knowledge of mankind, and a felicity in expressing his thoughts, which render his opinion of peculiar value, thus writes to us regarding his opinion of Sir Frederick Pollock as a judge :—

"One great feature of his character, or rather practice in criminal trials, was the favour he showed to prisoners. I have heard him direct acquittals in cases where, to my mind, there was not a doubt of criminality, either with regard to law or fact. Every technical difficulty was put in the way of the prosecution, every facility for returning to domestic life was given to the accused. We always felt when he had to try a criminal case that there were three chances to one against any other judge on the Bench. I would have handicapped Pollock at these odds against the very mildest of his brethren. Tory as he was, he always stood up for the liberty of the subject to commit what offence he pleased. Nevertheless, I always looked upon him as a most conscientious trier of cases, if he were only allowed to take his time about it."

A decision of some interest, as affording an instance that in certain special cases it may happen that the strict law applicable to the point may tend to contravene the direct and obvious intention of the parties, was made by the Lord Chief Baron in Michaelmas term, 1844, his judgment in which is remarkable alike for its logical accuracy and the lucidity with which it was expressed. We allude to the case of *Mallan and another v. May*, 14 L.J. Ex., 48. In this case by articles of agreement between the plaintiff, of "Great Russell Street, Bloomsbury Square," and the defendant, whereby the plaintiff agreed to instruct the defendant in the business of a surgeon—

dentist, it was stipulated that the defendant should not, without the consent of the plaintiff, carry on the business of a surgeon-dentist "in London, or in any of the towns or places in England or Scotland," where the plaintiff may have been practising, before the expiration of the said term. It was held by the Court of Exchequer that in its strict and proper meaning the word London meant the City of London, in which sense it ought to be understood in the above agreement, and not in its popular or colloquial signification, as including Great Russell Street, and other adjacent streets. The Lord Chief Baron, in delivering his judgment, observed as follows :—

"We must apply the ordinary rules of construction to this instrument, and though by doing so we may, in some instances, be misled, and defeat the real intention of the parties, such a case tends to establish a greater degree of certainty in the administration of the law. Now one of the rules of construction is that words are to be construed according to their strict and primary acceptance, unless, from the context of the instrument, and the intention of the parties to be collected from it, they appear to be used in a different sense ; or unless, in their strict sense, they are incapable of being carried into effect, and subject always to the observation that the meaning of particular words may be shown by parol evidence to be different in some particular place, trade, or business, from their proper and ordinary acceptance."

In the case before us no reasonable person can doubt that the intention of the instrument referred to, and of the parties themselves, was to exclude the defendant from practising in Bloomsbury, and had no reference to the City of London, where neither of the parties resided or practised. On the other hand, as little doubt can be entertained that the words sufficient and proper to express the intention of the parties were not availed of ; and that it is by the words themselves, not by any external evidence as to the intention of the parties, that courts of justice must be guided. If the parties neglect to use the proper words applicable to the case, and expressive

of their intentions, they alone are to blame, and must take the consequences.

Sir Frederick Pollock's private character stood high in every respect, both as regards his public and his domestic life. On his retirement it was remarked of him in one of the public journals :—

“ We doubt whether any man ever took with him into retirement a larger share of hearty, affectionate admiration than the kind old man who, after presiding over the Court of Exchequer for nearly a quarter of a century, retires into private life, full of freshness and vigour, and surrounded as closely as ever man was by all that should accompany old age.”

It has also been observed that his genial and lively humour was as playful during the last Guildhall sittings at which he presided, as when he first made his appearance at the Bar, or took his seat as Chief Baron for the first time in the Court of Exchequer.

His resignation of his judicial office took place in 1866, when he was in his eighty-third year, on which occasion a baronetcy was conferred upon him in recognition of his long and important judicial services.

Independent of his acquirements as a lawyer, Sir Frederick Pollock was a man of great accomplishments and of considerable scientific knowledge. Indeed, through life he evinced a fondness for science. In chemistry, astronomy, physiology, and medicine, he appeared as much at home in conversation as if to each he had devoted a lifetime of study. Once when presiding at the distribution of prizes at St. George's Hospital, Sir Frederick Pollock said, while addressing the pupils, that had he been able to choose his lot in life he would have studied medicine, but at the same time he would have practised law. And the consideration with which he always treated medical witnesses, and the acuteness with which he analysed medical evidence, were remarkable points in his career. He had also a very extraordinary knack of imitating handwritings, which he could effect so adroitly as to deceive the very person whose

writing was forged. On one occasion he directed a letter to a barrister in a hand so exactly like that of the barrister, that his correspondent supposed that he must have left at his chambers an envelope directed to himself. On another occasion, when on the Bench during one of his circuits, he scribbled a note to the learned serjeant, whose letter respecting him we have quoted, informing him how completely he had deceived his brother judge, the late Mr. Justice Coltman, in this manner. But he possessed acquirements of a more solid kind, and even to a late period of his life he was a contributor of papers on scientific subjects to the Royal Society, of which he was for many years a fellow. In one of his letters to the writer of this memoir he said—

“I cannot continue this correspondence further *at present*. I have to complete a paper which the Royal Society are decided to print in the *Transactions*. Brougham’s first paper was probably that of the youngest member, mine, probably, of the oldest. Next month I shall be nearer ninety than eighty.”

Of the paper in question only an abstract had appeared in the proceedings of the Royal Society, and it was of a similar character to some which had preceded it, containing investigations to which he had been led in the attempt to demonstrate Fermat’s theorem. The paper was returned to Sir Frederick Pollock at his request, as he wished to make some additions to it, and it was afterwards printed in the *Philosophical Transactions*. A very few weeks before his death he was in correspondence with the Royal Society on scientific subjects.

For many years before his death Sir Frederick Pollock interested himself in the theory of numbers. He tried hard to obtain a demonstration of a theorem enunciated without demonstration by Fermat, and which has exercised the skill of some of the greatest mathematicians from Fermat’s time to our own, though no one has succeeded in obtaining a complete demonstration. Though he failed in the attempt

which had baffled so many others before him, Sir F. Pollock was led in the course of his investigations to remark some curious properties of numbers, and some of the various communications which he made to the Royal Society on the subject are printed in the *Philosophical Transactions*. The following is a list of the papers which he presented on the subject:—

(1.) On Certain Properties of Prime Numbers (read 1847)—*Proceedings* Vol. V., p. 664.

(2.) On Certain Properties of the Arithmetical Series, whose ultimate differences are constant (read 1850)—*Proceedings* V., 852.

(3.) On the Extension of the Principle of Fermat's Theorem of the Polygonal Numbers of the higher orders of Series, whose ultimate differences are constant (read 1850)—*Proceedings* V., 922.

(4.) A Proof (by means of series) that every number is composed of four square numbers, or less, without reference to the Properties of Prime Numbers (read 1851)—*Proceedings* VI., 132.

(5.) On Certain Properties of Square Numbers and other quadratic forms, with a Table of odd numbers from 1 to 191, divided into 4, 3, or 2 square numbers, the algebraic sum of whose roots (positive or negative) may equal one, by means of which table all the odd numbers up to 9503 may be resolved into not exceeding four square numbers (read 1853)—*Phil. Trans.*, year 1854, p. 311.

(6.) On Some Remarkable Relations which obtain among the roots of the four squares into which a number may be divided, as compared with the corresponding roots of certain other numbers (read 1858)—*Phil. Trans.*, year 1859, p. 49.

(7.) On Fermat's Theorems of the Polygonal Numbers (read 1861)—*Phil. Trans.*, year 1861, p. 409.

(8.) On the Mysteries of Numbers alluded to by Fermat (read 1866)—*Proceedings* XV., 115.

(9.) On the Mysteries of Numbers, alluded to by Fermat. Second communication (read 1868)—*Phil. Trans.*, year 1868, p. 627.

There are also two other papers of his on geometrical subjects, one in the *Proceedings of the Royal Society*, Vol. IV.,

p. 433, and another in the *Quarterly Journal of Mathematics*, Vol. I., p. 167.

For the above information respecting Sir F. Pollock's papers contributed to the Royal Society, we are indebted to the courtesy and kindness of their able and learned Secretary, Professor Stokes.

Sir Frederick Pollock was also an active member of the Photographic Society, took a deep interest in their proceedings, and presided at several of their meetings.

His familiar letters were full of interest as well as of kindly feeling, and replete with quiet humour.

As regards his domestic habits, he once told an accomplished friend, who now holds a deservedly high position as a County Court judge, and from whom we received the anecdote, that he considered the following were the two chief causes of his uninterrupted good health through life. In the first place, he never began work when tired in the least. He always went to Westminster Hall in a cab, while others thought it necessary to take exercise in going down there, and often arrived at their work hot and fatigued. His other maxim was, never to put anything cold into the stomach; our stomachs, he said, are cooking machines, and if you put cold food into them, you tax the utensil to make it hot in the first place; whereas, when the food is hot, half the work is done before the food goes into the stomach. In order to convince his friend of the effects of good digestion, he jumped up in the railway carriage in which they were travelling, and began to cut a caper, although he was then upwards of eighty years of age.

He seems, moreover, to have cared as little for fresh air as he did for exercise, and even in the hottest weather, in crowded courts, during the summer assizes, kept every window closed, appearing to delight in an atmosphere which very few could inhale without suffering severely.

During the latter part of his career at the Bar, and while he was Lord Chief Baron, Sir Frederick Pollock resided in

Queen Square, Bloomsbury, once the favourite resort of judges and leading barristers, and which he was the last to forsake. He had also a country residence at Hatton, near Hounslow, where he breathed his last, on the 22nd of August, 1870, in the 87th year of his age, respected and regretted by a large circle of friends, as also by the whole legal profession. Indeed it has been correctly observed of him, that through his long career he never made an enemy, while his most casual acquaintances were led to regard him as a friend. Every tone of his voice, every expression of his face, betokened the amiability of his nature, and the warmth of his heart.

The late Sir Frederick Pollock was twice married. First, in 1813, he was united to Miss Frances Rivers, who died in 1827. His second wife, whom he married in 1835, was Miss Sarah Ann Langslow, daughter of Captain Langslow, of Hatton. He had a very numerous family, several by each wife. His eldest son, the present Sir Frederick Pollock, is one of the masters in the Court of Exchequer, and was born in 1815. He graduated in high honours at Cambridge, at his father's old college. He has other sons at the Bar, and one of his daughters is married to Mr. Baron Martin.

Such were the career and character of this eminent and highly gifted man, whose success affords encouragement to each aspirant at the Bar, and whose high-minded course, both at the Bar and on the Bench, supplies an example which many may emulate, and a model which but few can excel. More brilliant orators, and more acute lawyers have adorned our courts, but none whose high moral bearing and great abilities have reflected upon them brighter lustre.

ART. IV.—THE JUDGES AND JUDICATURE OF ENGLAND.

Biographia Juridica ; a Biographical Dictionary of the Judges of England, from the Conquest to the present Time, 1066-1870. By EDWARD FOSS, F.S.A., of the Inner Temple. London: Murray. 1870.

“CERTAIN it is, that when a great learned man (who is long in making) dieth, much learning dieth with him.” Such is the quaint saying of Lord Coke in his eulogium on Littelton in the preface to the First Institute. To few men in our day, who have left this life, could these words be more applicable than to the late Edward Foss, the author of “The Judges of England,” “*Tabulæ Curiales*,” and the work at the head of this article. The studies and researches with which his name is identified he had entered on at an early period of his career, had pursued with steady assiduity amidst the avocations of a busy professional life, and had continued with unflagging zeal, till he died in his eighty-third year, whilst bringing the present volume through the press. Fortunately, much of his learning has been preserved in the volumes which he has given to the world, but much also bearing on the history of English Law has died with him.

The great merits of Mr. Foss as a legal antiquarian were, the thoroughness with which he pursued his investigations, and the accuracy with which he stated their results. The merely plausible accounts of many things connected with the origin and history of our judicial system, which writers even of authority have adopted, would not satisfy him. He spared no pains and no labour to elucidate any obscure matter which came within the range of his studies, and his mind seemed uneasy until he had obtained the solution of any difficulty that occurred to him, or had

satisfied himself that it was insoluble. A mere glance at a few of the lives of the earlier judges in the volume before us will show what pains he took in hunting through Rolls and Charters for the names and offices of men who were entitled to be entered on his list. In some respects, however, his labour was lighter than may be supposed from its results. He knew where to find the information he was in quest of, and it was seldom necessary for him to waste time in exploring barren fields. But he never shirked the trouble of going to original sources when such existed; and in none of the series of "Lives" of great officers of Church or State, of which our day has been so prolific, have scissors and paste been less used than in "The Judges of England." It is on this account that the work is so truly valuable; and it may justly be regarded as the greatest and most trustworthy contribution that has ever been made to our legal history. Future research may possibly throw light on some portions of that history which are still obscure or doubtful, but we confidently believe that in few instances indeed will any amount of research tend to invalidate the statements which this great work contains, or to discredit the views which are therein set forth. Such a work is very little likely to be superseded by one coming from an author more learned and more painstaking than Mr. Foss.

The present volume contains the biographical portion of "The Judges of England," alphabetically arranged and slightly abridged, with some corrections, and with the addition of judges who have been appointed since 1864. There can be no doubt as to the great practical convenience of a biographical dictionary for most purposes of reference, but we think it would have added to the value of the work if a chronological list of judges had also been given. In considering the history of any particular period, it would be nearly impossible to discover from the present volume, who were the judges who then flourished. The

author died before the work had finally passed through the press, but he does not appear to have contemplated any such addition as we have mentioned. We would suggest, however, that in a future edition it would be desirable to supply what we cannot but think is a defect in a work of this nature. We have no other criticism to offer on the form of a work, the substantial merits of which ought to ensure a large circulation.

Of the great interest of the subject on which Mr. Foss's labours were expended, and which are now presented in a form generally accessible, there can be no doubt. Of nothing connected with their history and their institutions are Englishmen more proud than of the judges of England. From our system of party government our greatest statesmen have always been obnoxious to a considerable portion of the community, who differed from them in politics, and our divisions in religious opinions have rendered the fame of our greatest Churchmen only partial and sectional. But the law is independent of party or creed; its privileges are the heritage of all Englishmen, and its ministers have to look only to what it prescribes, irrespective of every other consideration. To them every member of the community, to whatever party or sect he may belong, may confidently appeal for justice as defined by the law. And it may be truly said, that since the Revolution of 1688, the judges of England have shown a degree of independence and impartiality such as was never exhibited by any other judges, or by any other set of men, placed in an official capacity, in any country in the world. They have carried all the best qualities of the English character to their highest perfection, the adherence to established rights, the love of fair play, the spirit of equality and justice, and the disregard of private interests when placed in competition with the public good. Nor have the intellectual qualities of the men who have filled the judgment seat during the period we have mentioned been less remarkable than their moral qualities. The great principles of the

Common Law have been adapted with consummate ability to the wants and circumstances of a state of society entirely different from that in which they were at first established. The doctrines of Equity have been developed with unfailing readiness as new conditions afforded exercise for their comprehensive scope, and have never lagged behind the most rapid changes of society. In the ordinary administration of justice, it is no matter of astonishment to see displayed the most complete mastery over the most difficult and complicated subjects, the soundest and justest discrimination, the most skilful apprehension of the law as applicable to the point in question, the ready detection of sophisms, and the sweeping away of whatever is irrelevant or misleading.

But all these great qualities have not belonged to the judges of modern times alone. *Vixere fortes ante Agamemnona.* The provision of the Act of settlement, that after the accession of the House of Hanover to the throne, the commissions of judges should be made *quamdiu se bene gesserint*, no doubt took a great temptation out of their way, but it is an entire mistake to suppose that it, or the influence of the press, created virtue, where before them had been only corruption. The influence of the Crown had scarcely been felt in the ordinary administration of justice, and the taking of bribes had always been condemned, and never practised except by a few judges. No age or country has furnished higher instances of judicial virtue, than the rugged independence of Sir Edward Coke, and the incorruptible integrity of Sir Matthew Hale. In ability and learning also the older judges, allowing for the times in which they lived, will not suffer from a comparison with their successors in modern days. As a rule, they knew the law thoroughly, and they applied it skilfully according to the ideas which were then prevalent. In all respects they were the worthy predecessors of those who, in more favourable circumstances and in more enlightened days, have adorned the English Bench.

It is interesting to find that since the institution of a

regular judicial system in this country, the judges in general have belonged to the same class in the community. Among the earlier Norman lawyers and judges of England, we find the names of the most powerful feudal families. But as the study of the law became more difficult, from its increasing bulk and complexity, it gradually fell into the hands of the gentry, a class in society almost peculiar to England, which has powerfully influenced her history, and to which she undoubtedly owes much of her freedom and progress. From this class the great bulk of the earlier judges of this country, like the later, sprung; and in the mode in which the former dealt with such a subject as the descent and conveyance of real property, so as to strike indirectly at the power of the feudal aristocracy, we see the influence of their origin. Much of the independence of the Bench may also, no doubt, be traced to a similar cause. Springing in general from honourable families, with a more or less ancient lineage, the judges of England have not owed everything to their official position, and have seldom even on attaining the highest elevation felt themselves immeasurably removed from their native sphere. They never became mere government officials; they were never severed in interest from the community at large; they have always been open to all the influences which have affected the more enlightened portion of society in England.

Another source of interest in such a work as the present is the close connection between the earliest condition of our judicial system and its latest stage. During the eight centuries over which the researches of Mr. Foss extended, various changes took place in the superior Courts, and in the mode of administering the law; but all the innovations which arose were effected simply by a modification of what had existed before. These changes, however, were much more considerable during the earlier portion of this long period, than during the subsequent and larger division. From the time of Edward I., when the separation of the Courts of King's Bench, Common Pleas and Exchequer was completed,

our judicial system has remained substantially as it was then constituted. Of course several changes have taken place, but in no instance have they been of a sweeping character. Mr. Foss has shown that the number of judges in the Courts of Common Law varied considerably up to the reign of Henry VIII., when that of four for each court seems to have been established. Perhaps the most important change in the history of these courts was the placing the Barons of the Exchequer on the same footing as the judges of the King's Bench and Common Pleas. Up to the twenty-first year of Queen Elizabeth, the Barons of the Exchequer had not necessarily been "men of law." They had, in fact, been chiefly selected from the officials connected with the revenue ; they did not go on circuit, and held an inferior position to the judges of the other two courts. But as this court, like the Queen's Bench, had brought ordinary actions within its jurisdiction, great inconvenience was felt from the judges not being learned in the law, and after the date we have mentioned, the barons who were appointed were selected from the serjeants-at-law. As these "Barons of the Coif," as they were called, to distinguish them from their predecessors, had no knowledge of revenue matters, it was necessary to obtain the services of an officer who was acquainted with the fiscal business of the Exchequer. This was the origin of the cursitor baron, who was first appointed in 1606, at which time the court was filled with legal barons.

The Court of Chancery has not undergone changes more considerable than the Courts of Common Law, since the time of Edward I. The Chancellor, who had been a member of the Curia Regis from the time of the Norman Conquest, had become the chief officer of State on the extinction of the office of Chief Justiciary. The clerks in Chancery had been in existence for some time before the reign of Edward I., but it was then that the Master of the Rolls was first appointed. The regular sittings of the Court of Chancery were certainly customary about this period. The Common Law jurisdiction

of the Court appears then to have been very much the same as at a later date, but the Equity jurisdiction, as now understood, was as yet only potential. The jurisdiction which had fallen to the Chancellor of correcting the injustice of the law, had been exercised from an early period. This arose from petitions presented to Parliament for redress of private wrongs being referred to him, from which the equitable jurisdiction of subsequent times was gradually developed. But the position of the Court of Chancery relatively to the Courts of Common Law was very much the same at the period to which we now refer as it has been since.

From the time then of Edward I., when the Courts of Common Law were put upon their present basis, we have Chancellors and Masters of the Rolls, Justices of the King's Bench and Common Pleas, and Barons of the Exchequer in regular succession down to the present day. The system of circuits had been in existence long before that time by means of Justices Itinerant. These were still employed until the reign of Edward III., the duties they performed then devolving on the regular judges when they travelled as Justices of Assize. Even the robes of the Common Law Judges seem to remain unchanged, except with respect to colour. In the time of Henry VI., the summer robe appears to have been green, and the winter, violet. The ornaments of the neck and head have varied, although the coif has still remained. A gold chain has always distinguished the chiefs.

So much for the history of the Courts at Westminster during the last six hundred years, in which we have to deal with institutions and customs which still remain. During the two previous centuries we find our judicial system in a somewhat nebulous condition. The Curia Regis, which finally became condensed into the Courts of Chancery, King's Bench, Common Pleas, and Exchequer, was presided over by the king himself, and was composed of the prelates and barons of the realm, and certain officers of the palace, such as the Lord High Constable and Lord Mareschal, the Lord High Steward

and the Chancellor. A consultative body of this nature existed in all the feudal monarchies, but its peculiar development in England arose from the special circumstances of this country.

Over the Curia Regis, in the absence of the king, the chief justiciary presided. This Court had apparently at first no original jurisdiction, but was merely a council to assist the king in the exercise of his prerogative, one of the most important branches of which related to the administration of justice. The matters which were brought before the Curia Regis in connection with this were not by way of appeal from the local courts and the justices itinerant, but rather in the form of complaints of illegal and improper proceedings. This at length led to suits being instituted there, and it led also to the association with the official members of the court of men who had devoted themselves to legal studies. Hence the origin of the Court of Common Pleas, which was formed into a separate Court at Westminster, after Magna Charta had provided that common pleas should not follow the king. On the abolition of the office of Chief Justiciary in the reign of Henry III., a separate Court, presided over by the Chief Justice of the King's Bench arose, which had cognisance of pleas of the Crown. There remained the authority exercised by the department of the Curia Regis, called the Scaccarium, in matters relating to the revenue, which was retained by the Court of Exchequer. The corrective jurisdiction of the Curia Regis, the *officina justitie*, and the custody of the Rolls remained with the Chancellor. The steps by which all these changes took place are no doubt somewhat obscure, but there can be no doubt as to the general nature of the process.

Before the separation of the Courts had begun, it is obvious that the Curia Regis had existed for some time as a High Court of Justice, analogous in many respects to what was proposed in the Lord Chancellor's Bill of last Session. Mr. Foss seems to have been struck by the resemblance, and he has left a note on the subject, which has been appended to the

preface he had prepared for the present work. In it, after alluding to the unlikelihood of his seeing the results of such a measure, he says:—

“ I own that I cannot predict that much material benefit will result from the intended change; and I am inclined to think that those who are conversant with the history of the past, will consider the new High Court of Justice little more than a revival of the ancient *Curia Regis*, with all its varied powers and privileges, which were distributed into the present divisions so many centuries ago. Another remarkable restoration will be noted in the new Statute—that by which the legal Terms are reduced from four to three, as they originally stood in the earlier times. But be the innovation good or bad, I am sure it is well intended, and I sincerely hope that it may prove as beneficial to the administration of justice as its promoters anticipate.”—p. xi.

It happened, however, that the Bill of last Session did not pass into law, as Mr. Foss seems to have supposed when he wrote the above observations, and the arrangement of our Superior Courts for the future still remains open for further consideration. We must frankly confess that we have no antiquarian feeling in favour of the restoration of the *Curia Regis*, interesting as that institution may be as the rudimentary condition of the judicial system, under which England has flourished for six centuries. The real question is whether, for the substantial objects which the Bill of last Session contemplated, it was necessary to remodel our Courts in the manner it proposed. The wise and sound method which ought to be followed in the reform of the law, as in all other kinds of reform, is to adopt what leads to the best practical results, without reference to theoretical perfection; and the great problem always is, how to produce the greatest beneficial effects with the least possible change. We cannot say that the Lord Chancellor's Bill was a happy solution of this problem. The fusion of Law and Equity, and the plenary jurisdiction of all the Superior Courts, may be admitted to

be a most wise, practical object, called for by the necessities of the times in which we live, and by the enlightened views of modern jurisprudence; but we fail to see how this object required the removal of so many ancient landmarks, and the obliteration of so many old distinctions, as the Bill of last Session proposed. It introduced new distinctions and new boundaries which apparently were in no respect better than the old. To many persons these changes appeared to be of a theoretical and pragmatistical character, and to some who were entitled to speak with authority they seemed fraught with danger to our constitutional liberties. At all events the Bill was crude, and somewhat juvenile in its conception, and it did not appear to have been prepared with all the grave and solemn consideration which such a measure demanded.

What the next Session may bring forth we know not. Important changes in our judicial system are no doubt necessary, and a great field is open for those who possess the proper knowledge and capacity, to adapt it to the wants of the present times. The danger will lie, if we may judge from the measure of last Session, in attempting to introduce too wide a scheme, instead of providing for the redress of admitted evils by modifications of our existing system. It is by the latter mode that all the beneficial changes which from time to time have taken place in the administration of the law of England have been effected; and we firmly believe that it is by the same mode we must proceed in the future, if we really wish to improve our judicature, without endangering those parts of it which experience has shown to be conducive to the true interests of the community.

ART. V.—ON THE UNIVERSAL AND NECESSARY RELATIONS OF CHURCH AND STATE.*

BY ALEXANDER T. INNES.

ARE there any relations of Church and State, which must always and necessarily exist, apart from those which may, or may not, be constituted in the way of establishment and endowment?

With these last, and with the questions connected with them, we are familiar. They are interesting, and even exciting. But the interest taken in this matter of establishment has had one unfortunate result for the science of jurisprudence. It has withdrawn the attention of thinkers from questions which are more fundamental, and it has led men on both sides of the question to propose shallow remedies for deep-seated and perhaps insoluble difficulties. On the one hand, voluntaries have talked as if disestablishment would cut all knots and relieve all difficulties. The Church, apart from establishment, has been represented as a mere moral power, which could in no way come into direct contact or collision with civil interests. The emoluments of establishment, the privileges of establishment, the coercive power of establishment, are unquestionably all given to the Church by the civil authority—are all part of a monopoly conceded to it by the State; and it is continually assumed, and very often expressly laid down, by reasoners on this side of the question, that if these monopolies and privileges were simply cut away, the State would be free from all farther difficulty and complication on the side of the Church, and in reference to ecclesiastical matters. Then on the opposite side of the controversy, among the supporters of an establishment, a similar fallacy has

* This article contains the substance of a paper read at the recent Social Science Congress at Newcastle-upon-Tyne.

been nearly universal. Their idea and argument has been that disestablishment would drive the Church out of existence, or at least out of public and nationally effective existence. Some have imagined that it could no longer thereafter retain its whole ecclesiastical functions and do its proper Church work. More thoughtful writers have perceived that this is a mistake; but even they have assumed that immediately upon the State withdrawing from the Church its emoluments and privileges, the State would be bound to ignore its existence—at the very least that the State would be able to ignore its existence. On both sides the general assumption for the last fifty or eighty years in this country has been the same. Some have desired disestablishment and others have deprecated it; but both alike have regarded it as practically a close to all relations between the Church and the State.

I venture to think this a mistake; and if so, it is a matter which it specially concerns students of jurisprudence to consider. It is a matter of law rather than of legislation, and the tendency of a mistake at this point is to cut us off from all right theory and principle on one of the most important subjects with which jurists can have to deal.

That a disestablished condition puts an end to all civil questions on Church matters is a mistake quite demonstrable. Take, in the first place, questions of property. If a body of men have wrongful possession of a church, or of a sum of money—on the pretence, for example, that they are the religious body to which the money or the building was given—their opponents have no way of redressing the wrong and vindicating their own rights except by appealing to the civil tribunals of the country. And these civil tribunals have no means of doing justice, except by investigating into the differences of doctrine, discipline, or practice, which are thus brought before them. To the litigants these may be religious differences. To the judge they are mere matters of fact bearing on a question of civil right. But neither the Church litigating, nor the judge deciding, can evade their coming up

for judgment, on the ground that this is not a civil corporation but a Church, and a Church which has no recognition from the State in the form of establishment. If it is a Church, and a Church *tolerated* by the State, questions of property in which it has an interest will necessarily arise; and these will fall to be decided by the State and by the law, as certainly as if the Church were established.

And there are no bounds to the magnitude and variety of the questions which may, or rather must, thus arise, even in the case of a Church not established, with respect to its property. Whatever the form of the Church—Episcopal or Presbyterian, Hierarchical or Congregational—it must carry on its work by means of contributions or endowments of some kind, and in so far as it possesses these it necessarily comes into contact with the whole civil law of the country. No man can bestow fifty pounds upon a religious body without discovering this; but the enormous accumulations of property which have again and again taken place in every country of Christendom, and great part of which were prior to or independent of anything like establishment, have been instances of the same thing. The formal tenure under which a Church possesses the property is of less consequence. It may be held by the dead hand of the ecclesiastical or corporate body, or by the living hands of official administrators. In the early centuries it was not uncommon to bequeath money or property directly and by name “to Jesus Christ,” to the angel Michael or Gabriel, or to one of our Lord’s apostles or saints; and the legislation of the empire made provision for such bequests being received and managed by proper earthly representatives. In like manner at the present day in India, land and money is not unfrequently left to a god, and our law there recognises such a bequest, and provides for its management. Still more of course do the laws of all Christian lands recognise the validity of gifts, bequests, and endowments made to the Church, or to a Church; and although such possessions may ordinarily be held in the name and by the inter-

vention of trustees, they are certainly still in some sense of the nature of the Church's property.

Of course it does not follow, because the emoluments and endowments of a voluntary Church are its property, so that it may be said to have a vested interest in them, that therefore this right of property is absolutely unlimited. The vested interests even of individuals (and still more of public bodies), within a nation, have never interposed an absolute or effectual bar to interference by the nation at large, when some overpowering expediency or necessity has emerged. Even in countries where Church property is held in theory to be sacred or inalienable this has been the case, and the alienations and confiscations of the property of Churches and religious orders in Southern Europe have far exceeded any interference with similar possessions in Protestant countries. How far, and in what circumstances, such interferences are legitimate, or, to put it otherwise, under what implied conditions all property is held by individuals, or by public bodies, and in particular by Churches, is one of the highest and most difficult questions that can be proposed, but it is one which it is unnecessary for us to raise here. It is enough for our purpose to observe that the vested interest of a voluntary Church in its property is, by the confession of all, very much stronger than that of an established Church in the emoluments which it derives from the State. In the questions recently raised with regard to the Protestant Episcopal Church in Ireland, every one felt how much more powerful was the claim for compensation in respect of endowments which had been given by private donors, though it were centuries ago, than in respect of those given by the nation, and which the nation proposed now no longer to bestow. The argument was obvious, that what the State gave the State might have a right at any moment to resume; while the proposal to touch what the Church, even as an established Church, had received from others and held as its own private property, required a very much stronger case to be made out. Many private endowments given to an

established Church are no doubt given to it because it is an establishment; but many others are given to it, and would in any case be given to it, as a Church. And in this latter case quite as much as in that of voluntarism, a Church stands on its own rights, whatever these are (a point which we shall not minutely discuss)—and instead of persuading the State that it is a necessary or an expedient thing to give it such and such emoluments, it claims merely that it shall not be spoiled of the emoluments which it has already, and which the State did not give. But if it has this right, it has it natively and originally, and quite independently of establishment. We seem, therefore, to be forced to the conclusion that, even in respect of property, the primary and necessary relations of a Church and a State are those which are unconnected with establishment. The emolument of establishment is an accident. It may, or may not, exist, according to the view of duty or expediency which the State may happen to take. But long before establishment exists at all, a most important and necessary relation exists between the Church on the one hand and the State (or the law) on the other, in respect of the civil property which belongs to the Church for Church purposes; and the effect of disestablishment is merely to make this original and essential relation re-emerge. And this original relation is the important one for jurists, though it is this part of the law of Church property that has in this country been overlooked. It is about the Church in its independent position that all the most difficult questions cluster, and it is on this ground that the fundamental rights of parties are to be ascertained.

For the legal questions that relate directly to the property of a Church are only a part of those which we must look for, when there is no complication introduced by establishment. The places filled by the ministers and office-bearers of a voluntary Church have a certain pecuniary value, and the attainment or forfeiture of any of these is a matter about which there will be a constant tendency, rightly or wrongly, to appeal to the

civil tribunals. Nor is the question one only as to a Church's offices of rule or honour. The mere attaining and retention of a place in its membership is a matter on which a high value will probably be set; and as this is a thing in which all Churches theoretically reserve their own right to judge, according to their own rules, and is yet a matter in which individual character and feelings may be largely involved, we see at once that important questions may be raised. In most jurisprudences actions of damages or actions for reparation are competent to those who have been injured in their character and feelings. A man recovers 100*l.* of damages who has been slandered to an extent which the jury estimates at that sum, just as he recovers 100*l.* of which another has injuriously dispossessed him. Consequently, the whole actions of a Church, in so far as they bear upon individuals, are capable of pecuniary estimation, and *may* come under the cognisance of the civil tribunals of the country. The law has to do, at least the law *may* have to deal, with the whole working of a Christian Church, as well as with its whole property.

But if the whole property and procedure of a Church, even when not established, have a civil aspect, it is a rash thing for reasoners on the subject to speak as if declining to establish the Church would cut all knots and solve all public ecclesiastical questions. And it is equally rash for others to speak as if a Church could not carry on all its work to the full in disestablishment. The question arises at once for solution, What claims of a Church, even when not established, can a State acknowledge? The Christian Church in different ages has made many claims, some of them by the consent of all worthy of respect and veneration, and others at first sight doubtful and unsafe. Of all Church claims, perhaps the best known, because it is common to Catholic and Protestant countries, is the claim of self-government, autonomy, or independence. The idea of the independence of the Church is one familiar to every educated man, and by the acknowledgment of the highest and most philosophic minds, it has played a noble

part in European history. "The Church," says Guizot, in his "*History of Civilization*," "originated a great fact—the separation of the spiritual from the temporal power. This separation is the source of liberty of conscience; and it rests upon no other principle than that which serves as the basis of the most unrestricted and extended liberty of conscience. The separation between the temporal and spiritual power is founded upon the principle that physical force has no right or influence over the minds of men, or over conviction and truth. It results from the distinction established between the world of thought and that of action, between circumstances of an internal and those of an external nature. So that this maxim of liberty of conscience, for which Europe has struggled and suffered so much, and which has prevailed only so lately, often against the exertions of the clergy, was laid down under the name of a separation between temporal and spiritual power in the earliest ages of European civilisation." And this distinction between the spiritual and the temporal took the form of a separate spiritual government of the Church, not by chance, but as M. Guizot elsewhere points out, from absolute necessity. "No society can exist a week, even an hour, without a government. The necessity for a power or government over the religious society, as over every other, is implied in the fact of the existence of the society." Fortunately for us theorists the independence or separateness of the government of the Church is made for ever easy to our comprehension by the fact, that this government originated in Pagan times, and for whole centuries was necessarily that of a separate society. At a later date this early state of matters became changed, not merely by Constantine's gifts of coercion. For on the one hand the claims of the Church, especially in the Western communion, began to encroach far more on the temporal power than was implied in that primitive self-government or autonomy. And on the other hand that autonomy itself has, in the case of not a few of the Reformed Churches, been exchanged, rightly or wrongly, for some of

the benefits of establishment. In the first case the Church (in the middle age) demanded more than mere independence. In the second case it has (more recently) accepted less.

We shall, I think, find it expedient to occupy ourselves at present with neither of these exceptional cases. With regard to the Church of Rome, I wish to avoid all matter of controversy; but the claim by an ecclesiastical body to prescribe religious truth (and that infallibly) to temporal powers, the withdrawal of the temporalities of the Church from the jurisdiction of the States in which they locally exist, and the demands for immunity to the persons of ecclesiastics—all these are assumptions so generally repudiated by lawyers in the north of Europe, that there can be no offence in my at present merely passing them by. Those Protestant communities on the other hand which (like the Puritans in the time of our civil wars, and Scotland and the United States in our own time,) still lay stress on the original Church independence, emphatically refuse to conjoin with that position those higher claims which the great Latin Church has put forth. In fact, in their case, Church independence has been historically associated with the struggles of civil freedom against despotism, both civil and ecclesiastical. It is manifestly, therefore, rather in such cases, where there is no establishment, and where independent Church power is put at its minimum—where indeed mere self-government is claimed and nothing more—that we shall find our best illustrations of the theory. It is there that we shall best look for an answer to the double question—to which it is necessary for us as jurists to find an answer somewhere—How far can a civil State tolerate the Christian Church? and, How far can the Christian Church, when independent and unestablished, exercise its whole powers and functions?

On this question, probably, the most important judicial utterance in the courts of the United Kingdom is the principle of the Privy Council decision in the case of *Long v. The Bishop of Capetown* (1 Moo. P.C., N.S., 411), because by its

terms it is intended to apply universally to all religious communities :—

“ The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position ; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly, or by implication, have assented to them. It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, then the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice.”

I observe that in the subsequent case of the Bishop of Natal (*Dr. Colenso v. Gladstone*, Law Rep., Eq. Cases III. 1) some doubt is cast by the Master of the Rolls upon the assertion that the Church of England in the colony is in the same situation with other religious bodies ; that body being held by him to be tied, to certain effects, to the established Church at home ; but on the general question, with regard to the rights of Christian Churches universally, Lord Romilly confirms the position already laid down. He says, in illustration of this—

“ The members of the Church in South Africa may create an ecclesiastical tribunal to try ecclesiastical matters between themselves, and may agree that the decisions of such a tribunal shall be final, whatever may be their nature or effect. Upon this being proved, the civil tribunal would enforce such decisions against all the persons who had agreed to be members of such an association—that is, against all the persons who had agreed to be bound by these decisions ; and it would do so without inquiry into the propriety of such decisions.”

It does not appear to me that more is necessary than is here laid down, in order practically to guarantee the independence, or autonomy, or self-government of a Church, though there is a good deal more necessary in order to work the thing out theoretically. All Churches theoretically repudiate the idea that their original right of self-government comes to them merely *ex concessio* of the civil power; and the statements quoted do not necessarily imply more than such a concession, on the ground of civil contract. By far the most difficult question for lawyers lies behind,—Is the independence of Churches a thing which the law should concede on the ground of toleration and conscience, as well as on that of contract? Is the ecclesiastical region a separate one, with which law should ordinarily refuse to meddle, on the ground of the rights of conscience; or, must a special contract by the parties, making the ecclesiastical judgment final, be averred? This will be found a great question in the future; but in the mean time there does not seem any reason why the Christian Church unestablished should not under the protection of this principle of concession, or even of contract, exercise its complete powers and functions as freely and fully as it can possibly do in establishment. I say, *as freely*; but of course the real state of the case is, that it may do it a great deal more freely, because there is no establishment in the world in which a certain amount of control has not been insisted on by the State and accepted by the Church in exchange for the benefits of establishment. The one case in which, so far as I know, it was seriously and persistently sought to establish an exception, is that most instructive one (to jurists) of the Church of Scotland. In that Church, from the Reformation and first establishment of Presbytery, the claim of independence was always made, and it was claimed as essential to the Church, while other things were mere State concessions and privileges. This is the great peculiarity which makes Scotch ecclesiastical history useful to the law student. The Church there never claimed personal immunity for its officials; it never pretended to with-

draw from the State the independent right of judging upon religious truth for State purposes, and it always acknowledged that control over property of all kinds (including its own emoluments) belonged both judicially and legislatively to the State alone. Again and again in its history it reduced its claims to that of bare self-government in ecclesiastical matters, and by representing this as the original and inalienable liberty of the Church, it sought to secure it even in establishment. The culminating instance of this is perhaps in the Claim of Right of the Church of Scotland presented to Parliament in 1842, in which the Assembly commences by saying, that "They fully recognise the absolute jurisdiction of the civil courts in relation to all matters whatsoever of a civil nature, and especially in relation to all the temporalities conferred by the State upon the Church, and the civil consequences attached by law to the decisions in matters spiritual of the Church Courts;" and only thereafter do they go on to claim (but to "claim as of right"), that the decisions of the Church in these matters spiritual shall not be reversed. This claim had already been refused in anticipation by the House of Lords, Lord Campbell pointing out that "a renunciation of the temporalities of the Church with a view to retain spiritual jurisdiction cannot be made by those who continue members of the establishment;" and on the Legislature also refusing to take it up, those who agreed with the Church that this self-government in spiritual matters was essential were forced to redeem their pledge, and form a Free Church outside. Our Northern Church history therefore conspires with all the other considerations that have been mentioned to assure us that, in order to get at the original and necessary relation of the Church to the State (the former still retaining its self-government, and the latter its supremacy over the civil sphere), we must go outside of establishment.

And I cannot but think that the original jural relations of the Christian Church, while yet it supports and governs itself within the equally independent State, form a noble subject of study. It is certainly a difficult subject. For

even after we have acknowledged the "Free Church in the Free State," as Cavour put it, and its self-government by means of voluntary tribunals, many questions remain. Suppose such a tribunal acts with cruel injustice, is the civil power to give no redress to the party injured by a wrong decision? Or, if the very constituting of these tribunals implies that Church members submit to their wrong though honest decisions, is there to be no appeal against a decision which is not only wrong, but dishonest, though it shelter itself under the form of ecclesiastical law? Or, again, suppose that the decision does not observe the forms of law, but expels a member of the Church without a fair trial—is there no appeal? Finally, if there is in any of these cases an appeal, even from a voluntary and self-governing Church (such an appeal, for example, as is well-known in the history of the Gallican Church as the *Appel comme d'Abus*)—to what extent and effect is it competent? Is the State to confine itself to the large region made over to it by the Church of Scotland—"all matters whatsoever of a civil nature," including the temporalities conferred by the State upon the Church, and the civil consequences attached by law to the Church's decisions in matters spiritual; or is it also to reverse and regulate these matters spiritual themselves, and that even in a voluntary Church?

These questions form a large and most interesting field, and have hitherto not been very much worked. I regret to say that the only jurisprudence with which I profess any exact acquaintance, that of Scotland, is on such subjects in a state of great confusion and helplessness; the theories of northern churchmen, whether right or not, being hitherto far more scientifically reasoned out than those of our lawyers. And yet this subject has been more forced upon our attention historically in Scotland than it has been upon yours in England. This state of things, however, cannot very long continue. A time seems to be coming when the mere technical knowledge of those Statutes, and other machinery,

by which the artificial state of Churches which happen to be established is kept up, will not be enough; and when the essential rights of such institutions, and their universal relations, not to some but to all civil governments, must be considered. Probably no better starting-point for such an inquiry can be found than the original position of Christianity under the world-wide jurisprudence of Rome; and there is certainly no better test of what the claims of the Church must at the lowest be held to have been. Even the eloquent Dean of Westminster, in arguing against Church independence, courageously accepts this test, and founds on the appeal to Cæsar. And it is still more striking to find M. Renan, after a review of the legislation of the same period, holding, on the one hand, that the refusal by the State to admit independent religious societies to exist within it was the root of all the ancient persecutions, and urging, on the other, that the constitution of such free societies is for Europe the great problem of the future.

ART. VI.—THE LORD CHANCELLORS OF IRELAND.

Lives of the Lord Chancellors and Keepers of the Great Seal of Ireland from the Earliest Times to the Reign of Queen Victoria. By J. R. O'FLANAGAN, M.R.I.A., Barrister-at-Law. 2 vols. London: Longmans & Co. 1870.

EXACTLY a quarter of a century has passed away since the publication of the first portion of a voluminous series of *Lives of the English Chancellors*, inscribed with the name of John, Lord Campbell. That venerable and learned author seems to have occupied the four years of leisure which had followed on his resignation of office in 1841, in the compilation of that which grew to be a very ponderous work, and at the

same time neither an unreliable nor an unamusing one. The seven volumes of "Campbell's Chancellors" are of an order that can specially assert its value when the reader finds himself, imprisoned by bad weather, in a country house. They afford an easy and agreeable method of refreshing the memory as to almost all the salient points of English Constitutional History. There is a flavour of antiquarian and learned research about them, which seems to exclude all suspicion that the time of the reader is wasted on mere idle gossip; while there is furthermore a variety of incident, and a *naivete* of comment, which unite to redeem the work from the charge of dullness. It may be that Miss Agnes Strickland and others were justified in their complaint that the noble biographer had borrowed much from their labours, and had forgotten to acknowledge some of his obligations; but that is almost inevitably the charge brought against comprehensive biographers; and if those seven octavo volumes had contained a vast amount of newly gathered ~~of~~ Scottish material, the outcry would have been far longer and far louder.

Furthermore, Lord Campbell was on the whole a tolerably impartial and good-natured writer. He could discourse even upon the life and actions of Lord Eldon himself without acerbity. Perhaps we might go so far as to assert that his sketch of the great Tory Chancellor will in future years be regarded as more valuable, because more discriminating, than the copious and more laudatory biography elaborated at an earlier date by Mr. Horace Twiss, with the aid of family papers and doubtless under family influences. On the whole it is likely that, in the majority of cases, a condensed and impartial narrative, if ably executed at a proper interval of time, will possess a higher permanent value than the familiar and somewhat heavy work, in two vols. with portrait—the authorised biography—which some friend and admirer thinks it a duty to construct shortly after the decease of any very eminent legal or political personage. There were other considerations which must have influenced Lord Campbell's mind,

and favoured his enterprise. Generally speaking, the Lord Chancellor of England has ever been the most capable lawyer, and one of the most eminent politicians of his day. His life-story, therefore, when adequately told, may be expected to include the more noteworthy passages of British history. How could a work be otherwise than of perennial interest, which should tell of More and Wolsey, of Bacon and Clarendon, of Shaftesbury and Somers, of Hardwicke and Thurlow, of Erskine and Eldon?

The fact that Lord Campbell's Series of Lives quickly attained to the distinction of a third edition, appears to have suggested enterprises of like character to other writers. "Lives of the Speakers," "Lives of the Archbishops," &c., were undertaken, and in due course published: but there is no reason for supposing that any of them attained, or ever were likely to attain, to equal popularity; and for this the reasons are not far to seek. No office has been exalted by the genius and adorned by the gifts of its occupants like the English High Chancellorship.

We do not, however, wish to be understood as underrating any of these later works; and the very latest of them, that which brings in view all the former holders of the Great Seal of Ireland, will form the groundwork for the remarks which follow.

Its author, Mr. O'Flanagan, is a very learned and scholar-like member of the Irish Bar, who holds a subordinate position in the Court of Bankruptcy and Insolvency. Many years since he published some volumes which evinced a minute knowledge of the legal history and the topography of his native land.

There appeared to him no good reason why the Irish Lord Chancellors should not be carefully tabulated, and fully sketched—Lord Campbell's experiment having turned out such a happy success. Before undertaking a labour which must have been extremely onerous, or rather before making any considerable progress in it, he communicated with Lord

Campbell on the subject; and, subsequently, with the representatives of that learned judge after his death. It seems that any intention of writing the lives of the Irish Chancellors which may have been entertained by Lord Campbell was not to any discoverable degree carried out. The field was completely unoccupied and clear; and Mr. O'Flanagan took in hand and accomplished his task with as much energy and industry as could have been met with even at Stratheden House. If Lord Campbell had written these "*Lives*" they might have been more amusingly written; and the style (although no elegance could indeed be looked for) might perhaps have been more clear, pointed, and precise: but as a *repertoire* of information, honestly and laboriously gathered together, the work could hardly have been better executed.

The "*Lives of the Irish Chancellors*" will therefore hold a position far higher than that of a work to be borrowed during a season from the circulating library, and afterwards forgotten. It may claim to stand on a prominent shelf of every considerable collection of books which already possesses such works as that of Campbell; and, notwithstanding some defects which shall candidly be remarked upon, it may be expected to fill permanently, and on the whole satisfactorily, a niche long vacant in the legal literature of the Empire.

When a second edition of this work shall be called for, Mr. O'Flanagan will do well to make a few alterations here and there. The defects are none of them of great moment, yet they might as well be removed. Humorous stories and indifferent puns are put on record in rather a careless manner: some of the anecdotes are incorrectly though verbosely related; and in more than one instance, the point has been missed, or there was no point which justified the preservation of the joke. Again, some of the foot notes, especially where containing references to the author's friends or acquaintances, should be omitted as being irrelevant to the purpose of the book, and full of unnecessary laudation. Two instances of these not grave defects may here be referred to. A Dr.

Miller is introduced into the text rather unnecessarily; while an ample foot note contains a very full and eulogistic notice of Dr. Miller's son. This gentleman doubtless merits all the praise bestowed on him; but there is no reason why it should be printed amongst the Lives of the Irish Chancellors. Again, Mr. O'Flanagan goes out of his way to attribute the success of the Incumbered Estates Commission (A.D. 1849-1858) to the fact of ex-Baron Richards having presided over it. It would be as reasonable to ascribe the rapid voyage of an ocean steamer to the skill of the steersman, omitting all mention of the steam-engine. The guidance was excellent; but the heavy work of that famous tribunal was performed by other hands; and its success was mainly owing to the untiring energy and rare ability of the late Charles James Hargreave, Q.C., a member of the English Bar, who died in the prime of his years, and of whom a biographical notice appeared in the pages of this Magazine in August, 1866.

Notwithstanding a few defects which may easily be remedied in a second edition, Mr. O'Flanagan has performed a very difficult task with unusual diligence, conscientious accuracy, and praiseworthy impartiality. And having rendered this willing tribute to the author, we may proceed to glance over the chapters of his work, and note some of the more remarkable passages.

The origin of the Irish Chancellorship is involved in obscurity; and for a century or more after the memorable invasion nothing is known except that some bishop, baron, prior, or canon, held the office of chancellor. The first chancellor who can be said to possess more than the mere shadow of a name, was a certain Archbishop de Bicknor, in the reign of Edward II. Like all the early judges and officers of State he was an Englishman. It is no small praise for a man who lived in the "dark ages," to have distinguished himself by encouraging education, and by repressing idleness and mendicancy. Several of his successors were also arch-

bishops; of many of them nothing is known: others were involved in the disputes and troubles which retarded Irish civilization, and proved that "Ireland was never subdued." After a long interval we arrived at Lord Loftus, founder of the noble House of Ely, who, after possessing the confidence both of Charles I. and of the haughty viceroy Strafford, fell from power with unusual suddenness in 1639; and the Great Seal rudely snatched from his grasp, was handed to Sir Richard Bolton, who like many others of his time had in early life crossed the sea to seek his fortune in Ireland. Of his later years it is singular to find so little on record. It is even doubtful whether he held office under Oliver Cromwell, or whether he died in the land of his adoption. The loss or destruction of records has in Ireland left many curious historical gaps, which may perhaps be filled hereafter.

In 1655, one of the three Commissioners of the Great Seal was a man of note, Miles Corbet, who had signed the king's death-warrant, and was afterwards Chief Baron at Westminster. Shortly after the restoration, unfortunate Corbet was arrested in Holland, cruelly treated by his captors, and publicly executed as a regicide in London. Then succeeded Steele and Eustace, not exactly remarkable men, yet living and acting in times of such profound interest, that their brief biographies possess undeniably the qualities which readers most appreciate. Lord Chancellor Michael Boyle was the last clerical chancellor, and he did no discredit to the episcopal order. Although an archbishop, he had a competent knowledge of Equity, and his collection of general rules entitles him to the character of a law reformer. He was one of the sons of the famous Richard Boyle who, at the age of twenty-two, walked into Dublin with no fortune beyond his native shrewdness, and who founded in his own family several remarkably well-endowed peerages. Any estimate of this lucky adventurer's wealth at the time of his death would appear fabulous. His son Michael, archbishop and chancellor, built a country house amongst the hills south-west of Dublin. The house has now disappeared,

but the park, the enclosure, the church and peal of bells, are all shown to the tourist who visits the picturesque village of Blessington, as memorials of its founder. His successor Porter, after holding the Great Seal of Ireland for a time, resumed practice at the Bar in London; and judging from an extravagant compliment paid to him by Lord Clarendon, he must have been a singularly upright man when compared with his cotemporaries. Of a string of his successors, we merely note that they do not seem to have been very remarkable men, or to have influenced the course of history in any appreciable degree. Several of them founded peerages, but few were very distinguished either at the Bar or on the Bench. In truth only two men of the very first order of intellect and capacity have held the office of Lord Chancellor of Ireland; and it is necessary to pass over in silence a long series of their predecessors, in order that we may devote the short space that remains to some mention of John, Earl of Clare, and William, Baron Plunket, with but very slight references to some intermediate names.

John Fitzgibbon, first Earl of Clare, was one of those men who leave their mark on the history of their country. No one can scan carefully that full-length portrait of Lord Clare which adorns one of the largest halls in Trinity College, Dublin, without being conscious that such a man was *capax rerum*, no idle recipient of high honours and large emoluments, no mere ornamental figure-head of a vice-regal government. Power and originality are visibly impressed on the lineaments of a face and form which required no flattery on the part of the artist to make them remarkable. Mr. O'Flanagan found himself unable to sketch the earlier history of the Fitzgibbon family without some parenthetical and rather uncalled-for denunciation of the penal laws. Those laws were, as every man of this and of the last generation will have freely admitted, in the highest degree unjust and impolitic. But they militated little against the success in life of the elder Fitzgibbon and of thousands of other Catholics. He was originally

a Catholic, and the son of a Limerick farmer.* Yet he had the manifold advantages arising from an excellent education in France; and he seems to have entered at once into a very lucrative practice, after his return to his native country. While yet a law student, he distinguished himself by publishing a volume of reports of cases determined in the English King's Bench, thereby causing some offence to some of the higher legal authorities, who disapproved of unauthorised reports by an irresponsible reporter. Notwithstanding all penal laws, and other drawbacks of the kind, which certain modern writers delight to dilate upon, Fitzgibbon the elder, the father of Lord Clare, enjoyed a career so prosperous that, although no orator, and not possessed of any commanding abilities, he contrived to amass a hundred thousand pounds. This was no bad career for an unhappy victim of the penal laws. His more famous son started with the advantage of a large fortune, in addition to all other gifts and advantages. During the very first year of his practice the future chancellor realised a considerable income; and at the early age of thirty-four he was made Attorney-General for Ireland. It could hardly be otherwise than that so successful an advocate, feared, if not loved, by all his contemporaries, rivalled by none of his professional brethren, and backed by very large private resources, should become a ruling power in his native country. For nearly twenty years Fitzgibbon appears to have been the virtual governor of Ireland. He was, in the largest sense of the word, an imperialist. He disapproved of the volunteer movement, and of every other movement which, in his opinion, threatened to separate Ireland from England.

Of course these political sentiments rendered him obnoxious to Curran, to Grattan, and to all other prominent men of the patriotic or nationalist party. This animosity did not limit itself to rhetorical warfare; for Fitzgibbon and Curran fought a duel—from which no fatal result followed. In 1789 the Irish Chancellorship became vacant;

and Lord .Thurlow for a time exercised all his influence to prevent the appointment of an Irishman. Ultimately he gave way, and wrote a particularly gracious and flattering letter to Fitzgibbon, who on gaining the Great Seal became Earl of Clare. Curran's antipathy soon exhibited itself in bitterly satirical outbursts, even in open court, for in those days men who hated each other made no secret of their feelings. The Chancellor was bold and inflexible in his determination to suppress all insurrectionary movements and tendencies; yet his biographer is enabled to recount many acts of personal kindness exercised towards the unfortunate victims of the national *furor* of 1798. But the most remarkable passages of Lord Clare's career are found connected with the Legislative Union, which seems to have owed its accomplishment in a high degree to his ability and determination. The history of this stormy epoch is not briefly to be summed up. Sufficient to say that the favourite project of Pitt and Castlereagh was most cleverly and rapidly carried into effect by the Irish Chancellor, regardless of the cloud of unpopularity with which he was covering his name and fame. He did not long survive the Act of Union; and on the occasion of his funeral in January, 1802, the Dublin populace exhibited their hatred of his memory in a very unusual and most undesirable manner. Lord Clare's gallant descendant, the young Viscount Fitzgibbon, perished in the light cavalry charge of Balaclava; and the male line being now extinct, the brilliant Chancellor of the Legislative Union is represented by his granddaughter the Countess of Kimberley.

The next Chancellor of Ireland in all respects presented a contrast to his immediate predecessor. John Mitford, while a very young man, wrote his well-known treatise on Equity Pleadings, and soon after his call to the Bar he attained to a considerable practice in Chancery. He was Solicitor-General—Scott, afterwards Lord Eldon, being Attorney-General—during the stormy years which followed the French Revolution.

It must have been a relief when, after conducting far too many prosecutions for sedition and libel, he was lifted into the more serene atmosphere of the judicial world. He went over to Ireland as Chancellor in the year 1802; and there appears to have been no outcry against the appointment of an Englishman to the Irish Chancellorship, as there certainly would be were such an appointment attempted at present. The indirect yet powerful influence of the Legislative Union still for many years subsisted; and during the four years of Lord Redesdale's Chancellorship, the Irish Bar were content to acknowledge his profound and exact knowledge of Equity jurisprudence, without complaining that his earlier years were spent on the Eastern instead of the Western side of St. George's Channel. The ex-Chancellor died in 1817, leaving a son who is known to fame as the Chairman of Committees, and one of the most able and publicly-useful members of the House of Peers. For a short interval the Great Seal of Ireland was held by George Ponsonby, to whose credit or discredit nothing very special can be said. To him succeeded Thomas, Lord Manners, a grandson of the third Duke of Rutland. He was educated at the Charterhouse, and at Emmanuel, Cambridge. In 1805 he became one of the Barons of the Exchequer; and in 1807 he was promoted to the Irish Chancellorship, with a peerage. Mr. O'Flanagan is very unlikely to flatter unduly the memory of this staunch old English Tory, and therefore the following criticism of Lord Chancellor Manners has a special value:—

“He was attentive, decorous, gentleman-like, distinguished for his urbanity; not indeed deeply read, but evincing ability to understand, and judgment to decide. He tried to expedite business, and to simplify the practice of the Court of Chancery.”

His reign in Chancery almost coincided in point of time with that of Lord Eldon in England; and he may perhaps be described as a small-print edition of Eldon. Politically they were alike; yet Lord Manners, although of smaller intel-

lectual calibre than his great cotemporary, appears to have excelled him in one very important particular. He was uniformly averse to delay ; and he delivered his judgments very speedily ; clearing off his list of causes in a most exemplary manner. Mr. O'Flanagan quotes several satirical and incisive passages from the writings of the brilliant R. L. Sheil, which are more or less unfavourable to the worthy Chancellor ; but Sheil was a rhetorician by nature ; and his lively descriptions, although destined to be read for many a long year, will always be read *cum grato* by the cautious student of cotemporary history. The next Chancellor of Ireland, Sir Anthony Hart, was also an English lawyer. His name appears in the Equity Reports of many a term, while Eldon presided at Lincoln's Inn. In 1827, there must have been "reasons of State," at this distance of time unfathomable, for passing over Plunket, the foremost member of the Irish Bar, and transporting Hart to Dublin, where he remained for about four years. His amiability, patience, and impartiality made a deep impression on the practitioners in his court, and they seem to have sincerely regretted his departure in 1831.

The next Irish Chancellor was the famous W. C. Plunket, of whom we shall say but little. The Bar of England or of Ireland never produced a more deservedly renowned advocate. The history of his life has been told more than once of late : and it has been very fully set forth in a biography recently published by his grandson, Mr. D. Plunket, who at an unusually early age has deservedly gained the distinction of a silk gown, and the still higher honour of a seat in Parliament as one of the representatives for the University of Dublin.

Plunket, as all the world knows, began life as a flaming Nationalist ; and as such he consistently and resolutely opposed the Legislative Union. Many of his countrymen have, however, never forgiven his memory for a display of energy in prosecuting some of his former friends, whose patriotism outran all bounds of discretion. But it is admittedly hard to convince the public that an advocate having taken a brief,

whether from the Crown or from a prisoner, is bound to use his best exertions for his client. In later years, Lord Plunket, who had a numerous family, happened to find ready to his hand extraordinary and unexampled methods of providing for them at the public expense. Mr. O'Flanagan quotes (Vol. II., p. 563) a list of these emoluments enjoyed by Lord Chancellor Plunket and his sons and dependants, amounting to nearly 28,000*l.* per annum. Probably there are several inaccuracies in this remarkable catalogue; but making due allowance for errors, there can be little doubt that Plunket and his family drew greater revenues from the public than any domestic group in modern days. It is fair, however, to add that several other legal and political men of renown might have been equally ready to have availed themselves of opportunities of enrichment, if such had offered. Plunket was in no way remarkable as a judge. His fame, which will not quickly be obscured, rests upon his manly, eloquent, and spirit-stirring utterances in Parliament and at the Bar, and it is very questionable whether this empire ever produced a man who surpassed Plunket as an orator.

The work before us does not carry down to a later date the history of the Irish Chancellorship. Lord Campbell himself succeeded Plunket, his tenure of office being limited to a few days. Then came the learned Sugden, who for several years enlightened the domain of Equity Jurisprudence in a manner familiar to those who have read the Reports of Drury and Warren. Then followed a very long tenure of office by Sir M. Brady, a very just, accurate, and painstaking, if not a brilliant, Chancellor. Later changes have occurred of which there is no need to speak, further than to note that this great office is now worthily filled by one who combines the character of the upright judge with that of the accomplished orator. The warmest friend of Ireland cannot utter a more fitting prayer than this—that her destinies may henceforth be guided by the hands of men possessed of moral qualities and mental endowments like those exhibited by Lord Chancellor O'Hagan.

ART. VII.—THE CHURCH BUILDING ACTS.

AS we pass through the villages of our land, we see modest, unpretending buildings with some fanciful scriptural name over the doorway, such as “Salem, Bethel, Ebenezer, &c.,” indicative of the peculiar tenets of their attendants; oft times the more intelligible words, “Wesleyan Chapel,” remind us of the zeal and influence of the founder of “Methodism,” and a Roman Catholic chapel, too, shows that the emissaries of Rome have not been remiss in propagating their faith. Generally at the outskirts of the village stands the parish church, conspicuous as the emblem of the national religion. In our towns the same scene repeats itself, save that the chapel of the Nonconformist and the Romanist is a more prominent and imposing edifice, and the number of newly erected churches also testify to the wealth and energy of the adherents of the national faith.

It may be instructive, if not interesting, to examine under what different circumstances these edifices, distinctive as they are of two separate classes of religionists—Nonconformists, as including every grade of dissent, even that of Roman Catholicism, and Churchmen, whether high, low, or broad—have been built and made available for religious worship. No Act of Parliament, beyond the provisions of the Mortmain Acts, fetters or controls the spontaneous action of any religious body, other than that of the Established Church, in the erection of religious edifices or the endowment of their ministers. Owing to our diocesan and parochial system, the interests of the bishop of the diocese, of the patron and incumbent of the benefice—the latter to be affected more especially by the increase of church accommodation—must be consulted. A cumbrous procedure has been established, surrounded by numerous intricate conditions, created from

time to time by Acts of Parliament, now swollen to a large number, containing a body of law very difficult of interpretation, known to us as the "Church Building Acts."

Our cathedrals and old churches had been built at the cost of individuals or ecclesiastical bodies, but an impediment had been cast in their path by the passing of the Acts of Parliament which prohibited the bequest of land for any such purpose. From the days of Magna Charta downwards, there had been a great dread of land becoming in perpetuity the property of ecclesiastical bodies, to be held, as it was technically called, in "mortmain," implying thereby that it was inalienable, as the hand which held it was powerless as to transferring it to any other object. Many Statutes had been passed to extend and confirm this restriction on transfer of land for religious purposes. The clergy, however, oft times defeated this object by ingenious legal subtleties. These Statutes culminated in the Act of 9 Geo. II. c. 35, the preamble of which runs thus:—

"Whereas gifts or alienations of lands, tenements, or hereditaments in mortmain are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility. Nevertheless, this public mischief has of late greatly increased by many large and improvident alienations or dispositions, made by languishing or dying persons, or by other persons to uses called charitable uses, to take place after their deaths to the disherison of their lawful heirs."

The effect of the Statute was to prohibit the bequest of land by will to any charitable purpose, and the building or endowing a church or its minister came within that prohibition.

At the beginning of the present century the followers of Wesley and Whitfield, the founders of the Methodist Connections, were numerous and influential; although they frequently preached to crowds in the open air, they had procured the erection of meeting-houses or tabernacles, and had

secured a large congregational attendance. Other sects had introduced "dissent"—steps then deemed prejudicial to the interests of the national faith. The increase of population had been great, and the sense of the Legislature was roused to the importance of providing more effectually for the religious worship of the members of the Established Church. Many pious persons would give after death what they would not part with in their lifetime, but the Act of Geo. II. prevented this. In the year 1803, an Act* was passed "to promote the building, repairing, or otherwise providing, of churches and chapels, and of houses for the residence of ministers, and the providing of churchyards and glebes." It provided that land, not exceeding five acres, or 500*l.* in value, might be given either by will or deed towards erecting, rebuilding, repairing, purchasing, or providing any church or chapel, where the Liturgy and rites of the United Church of England and *Ireland* were observed. This Act was amended† to remove any doubt as to the power of the Crown to make such grants of land.

It was not, however, until fifteen years after the passing of this Act, that any decisive step was practically taken towards the promoting the building of Churches. Upon the establishment of peace in 1815, our Legislature, no longer absorbed by questions of foreign warfare, turned its attention to the objects of domestic welfare. Sedition and infidelity were rife, prosecutions had been instituted against the most prominent and defying transgressors, often without success,‡ clubs were formed for the avowed purpose of disseminating blasphemy and deriding Christianity, and even among the well-disposed religion was too often treated with apathy, if not neglect. The ministry of the day were roused to a sense of duty, and on the opening of Parliament, January, 1818, the speech of the Prince Regent, who was acting as sovereign

* 43 Geo. III., c. 108.

† Qy. 51 Geo. III. c. 115; and 52 Geo. III. c. 161.

‡ *E.g.* The trial of Hone in 1817.

during the incompetency of George III., contained this paragraph:—

“The Prince Regent has directed us (the Commissioners appointed to act in the absence of the Prince) to direct your attention to the deficiency which has so long existed in the number of places of public worship belonging to the Established Church when compared with the increased and increasing population of the country. His Royal Highness most earnestly recommends this important subject to your early consideration.”

Consequently the Chancellor of the Exchequer of that day in the month of March following, moved that this recommendation should be taken into consideration. After showing by statistics the deficiency of Church accommodation in several dioceses, he concluded by moving that “the sum of one million should be entrusted to commissioners to be by them advanced under certain regulations and restrictions towards building and promoting the building of additional churches and chapels in England.”

These provisions were embodied in a Bill which speedily passed both Houses without any opposition, save upon some of its minor details. This Act being the basis of the numerous Acts, numbering in the whole twenty-six, which have been engrafted upon it, it may be worth while to examine its provisions, although it has been so modified or amplified by the subsequent Acts as not to be relied on alone. Its primary object was to promote the building of churches in populous places, and its first and most important step was to provide funds for the purpose; 1,000,000*l.* was therefore to be paid out of the Exchequer. Commissioners were appointed for the space of ten years; that period has however been from time to time extended, and by the 19th & 20th Vict. c. 55, after 1st January, 1857, their duties, power, and authority were transferred to the Ecclesiastical Commissioners, they were to examine into the state of the parishes and extra-parochial places in the metropolis and its vicinity, and in all other parts of England and Wales, for the purpose of ascertaining

the parishes and places in which additional churches or chapels for the performance of Divine Service according to the rites of the Church of *England and Ireland*, as by law established, were most required, and the most effectual proper means of affording such accommodation.

They were empowered to make grants or loans for building, or in aid of building, churches or chapels in parishes or extra-parochial places, containing not less than 4000 persons, in which there was not sufficient church accommodation for one-fourth part of such population, or in such places in which it should appear that 1000 persons were resident more than four miles from any such church or chapel, and in which the Commissioners should be satisfied of the inability of the parishioners or inhabitants thereof to bear any part of the charge of such building. The Commissioners might, if they deemed it expedient, divide any parish into two or more distinct and separate parishes or ecclesiastical districts, by an Order of the King in Council, with the consent of the bishop of the diocese and the patron of the living, reserving, however, the tithes and other ecclesiastical dues or profits to the incumbent of any parish to be divided. For twenty years after the day of its consecration, every district church was liable for rates towards the repair, &c., of the original parish church. In every church or chapel built by the aid of a grant through the Commissioners, or by rates, one-fifth part of the sittings were to be "free seats;" the other sittings were to be let at a rent to be fixed by the Commissioners, out of which a stipend was to be paid to the minister, to be approved of by the bishop of the diocese.

These are the main provisions of the first Church Building Act, and which have practically been observed in framing the subsequent Acts, which amount to twenty-six; amending and repealing portions of each other, whereby such confusion and complication have been created that it is difficult, if not impossible, to arrive at their meaning. In dealing with a

question of Church rate under a local Act of Parliament,* now some years since, Dr. Lushington, sitting as Judge of the Consistory Court of London, said, "It has been no easy task to discover the meaning of the local Act, but that Act is light itself compared with the obscurity of the Church Building Acts." When a judge so enlightened, and competent to pronounce an opinion on that branch of the law with which he was so familiar, uses such language as this, it might have been expected that some steps would have been taken to remedy so growing an evil, but no; law reform proceeds but slowly, and it was not until long after these words were uttered, and when the Church Building Acts were denounced by all as a chaos of unintelligible confusion, that a remedy was attempted. In the year 1863 a comprehensive Bill, entitled "Church Building and New Parishes Amendment Act," repealing either wholly or partially all the Acts bearing on the subject from the 43 Geo. III. to the 19 & 20 Vict., both inclusive, extending over more than half a century, consolidating all the chief provisions of them, drawn by an eminent ecclesiastical lawyer,† was introduced into Parliament by the law officers of the Crown and the then Secretary of State, Sir George Grey. The Bill, as may be well supposed; since it embodied most of the provisions of twenty-six other Acts, is very lengthy; it contains 407 clauses, it is similar in its arrangement to the Merchant Shipping Act, divided into parts, with a clear and copious index, comprising within it all the Statute Law on the subject, whereby, instead of having to refer to several Acts to ascertain how much of each is repealed or amended, or how far the provisions of one are consistent or not with those of another in order to arrive at anything like a rational construction, and frequently failing in the attempt, the whole body of the law is collected and comprised in one Bill clearly and plainly laid down. Would that the same process were followed, so as to reduce the several Acts on any one branch of law into one intelligible Statute. We have on our Statute Book twenty-five

* The Hackney Church rate case.

† Archibald I. Stephens, Q.C., LL.D.

separate Marriage Acts, and although a commission was appointed to inquire into and report upon the state and operation of the various laws now in force in the different parts of the United Kingdom with respect to the constitution and proof of the contract of marriage, followed by an elaborate report dated July, 1868, and although a promise has been made by the Government that the law shall be improved, nothing has yet been done.

Much, however, has been done in the right direction upon this general question by the enactment 26 & 27 Vict. c. 125, intituled "An Act for promoting the revision of the Statute Law, by repealing certain enactments which have ceased to be in force or have become unnecessary." The Lord Chancellor (Westbury) in introducing that Bill said, in reference to the codification or framing a digest of our law:—

"When this is done, when the Statute Book has been cleared of superfluous and unnecessary matter, I hope to propose that another process be gone through, to which the previous labour is merely introductory. The enactments spread throughout the Statute Book relating to different subjects must be brought together in a connected form; I shall propose, therefore, to have a systematic classification of the subject matter of our legislation, &c."

The Bill he introduced soon became a law, whereby 1500 Acts of Parliament which had become inoperative or obsolete were discarded from our Statute Book. A volume has recently been published, styled "The Statutes—Revised Edition;" it contains in 792 large octavo pages all the Acts in force from 20 Henry III. (A.D. 1235-6) to 1 Jas. II. (A.D. 1685). It is presumed that the revised Statutes to the present day will not occupy a more bulky volume.

To return to the Church Building Bill of 1863. The second reading having passed, it was referred to a Select Committee, but no report upon the Bill was made before the end of the Session, it therefore died a natural death, was included in the doom of the innocents, and nothing has been heard of it since.

Could not some bishop or one of the archbishops either resuscitate it himself, or stir the Lord Chancellor to bring it again to life. It is a subject peculiarly fitting the attention of that branch of the Legislature containing so many prelates, as also one, if not more, ecclesiastical commissioner.

In the year 1835 two Royal Commissions were appointed to consider the state of the several dioceses of England and Wales, to ascertain the amount of their revenues, and arrange a more equitable distribution of episcopal duties, and to devise the best mode of providing for the residence of the clergy on their benefices. In consequence of the report of these commissions, the Act 6 & 7 Will. IV. c. 77, was passed, naming commissioners and making them a body corporate; very large powers were conferred on them by subsequent Acts, and they have consequently become a very important and influential body. It is no part of our purpose to say more on this subject than it was into this body that the Church Building Commission merged. And it is the Ecclesiastical Commissioners who supervise and control the erection of our churches, and those who have to seek their countenance or support must be fully aware of the inconveniences of doing so. They have an enormous fund at their disposal. According to their last report in the present year, they intend to dispose of 300,000*l.*, of which a sum of 3000*l.* a year is to be appropriated in perpetuity to the endowment with 200*l.* a year of new churches.

Any body or person may build a church having provided the site, and may acquire the patronage thereof in perpetuity with consent of the bishop, provided it is endowed (that is, a maintenance with a residence, or a fund for the purpose, is secured for the minister) and a competent fund is provided for the repairs of the church to the satisfaction of the Commissioners. A reference to the Acts will show the difficulties which beset such a proceeding. In the Consolidated Bill of 1863, which we have named, they are set forth in Part II. Churches may also be built without endowment by private subscriptions. Thus—if any twelve or more substantial

householders of any parish; district, or place, certify to the bishop that there is not church accommodation for more than one-fourth of the inhabitants thereof, or that the existing churches, or church, are, or is, situated at an inconvenient distance from the places of residence of any large number of the inhabitants, and that the persons desirous of building the church will provide out of the pew rents a competent stipend for a minister and the expenses incident to the performance of divine service, and the bishop give his consent, and is satisfied with the site and plan of the proposed church, such church may be built and used as such.

Again, churches may be built by, or with aid from, the commissioners, that is, out of the fund under their control; the rights of the patron and incumbent of the parish or district in which the proposed church is to be built are to be respected and reserved.

These are mere general outlines of the procedure towards building a church of the established religion; for the conditions to be observed, the forms to be complied with, and the general requisites towards completing that object, the Acts must be consulted. The Bill of 1863 has simplified them much by logical and systematic arrangement of their several provisions. Let us hope that it may soon become a binding law; in its passing through the Legislature, the doubts which have arisen in construing some of the provisions of the existing Acts may be removed, and a more clear and definite mode of procedure towards building a church, with all its surrounding circumstances, be established; but at all events the enactments of twenty-six Acts which have been accumulating for more than fifty years will be condensed in one comprehensive Statute.

ART. VIII.—RECORDS OF COUNTIES.

OF the provincial judicatures in this country, perhaps the most extensive, and one of the most ancient, is the Court of Quarter Sessions. By the terms of the commission, it had the *Jus archivi*, the justice first named being appointed *custos* of its rolls. This nomination is a mere honorary distinction, save that the *custos* has the patronage of appointing the clerk of the peace, who in the above behalf is his deputy. That officer should be gifted with legal learning and ability, or, as he may appoint a deputy, this qualification should be possessed by the deputy. The rolls, however, are still those of the justices, and it is against them that a mandamus to produce them must issue.

The Sessions' jurisdiction was originally over offences and breaches of the peace, in the preventive and punitive functions; but other concerns, as bridges, prisons, poor, wages, &c., were at very early dates put under their administration, and of these some required powers of taxation.

Pursuant to the direction of the commission, the *custos*, or his deputy, the clerk of the peace, entered an account of the justices' proceedings at Quarter Sessions in rolls or books, and filed the presentments of offenders, indictments, &c., laid before them; also the orders, certificates, convictions, &c., of justices out of Sessions, brought thither for confirmation; and licenses for concerns and businesses requiring restriction, or regulation to avert nuisance, of which licenses for ale-houses furnish an early instance (5 & 6 Edw. c. 23); so for theatres (28 Geo. III. c. 30), madhouses (14 Geo. III. c. 49), lying-in hospitals (13 Geo. III. c. 82), horse slaughtering yards (26 Geo. III. c. 71); so also chapels or conventicles for Dissenting congregational worship, and ministers licensed or certified under 1 Will. & Mary, sess. 1, c. 18 (Toleration Act); 52 Geo. III. c. 155 (Protestant Dissenters);

31 Geo. III. c. 32 (Roman Catholics): so also for protection of the members, &c., of benefit societies, friendly societies, and loan societies, whose rules were sent to be confirmed by Sessions, and were filed without fee, and annual returns of them were also filed without fee, under 4 & 5 Will. IV. c. 40; and savings' banks rules were deposited without fee, under 9 Geo. IV. c. 92; so for publication of names of official persons, and securing their qualification, as swearing rolls kept for entering the oaths taken by various officers, &c., under the Test Act, 25 Car. II. c. 2; to these may be added regulation of labour and various trades, of which the inspection of "Weights and Measures" is one important adjunct and is still retained, though some of the others are discontinued.

The above documents relate to the public business of the sessions, and may be called *Records of Court*, but there is a mass of deeds and papers brought by direction of various Statutes into the County Offices from the consideration that they afford facilities for keeping, copying, and resorting to inspect, instruments locally affecting places in the county, and which deeds, &c., it is deemed important to preserve for public or general reference.

Some of these are directed to be "enrolled," some to be "filed," and some "entered or filed," or "kept among the records." When enrolled they, or transcripts thereof, are put on the roll of the time, and they may be called *Inter Records*, if they are to be filed they are strung amongst the other contents of the sessional bundles.

The distinction of enrolling and filing is said (1 Marsh. Rep., 261) to be more of a directory rule to the clerk of the peace than of public import. It is probable that the law-maker did not always understand the distinction. A direction to "enter or file" probably gives the officer choice in the matter. "Depositing" might mean simply leaving with the officer at the office.

Such depositing, enrolling, &c., of deeds and documents does

not make them matters of record, where the Sessions Court takes no cognisance of the act of enrolling, &c., at the time of doing it. They are recorded to be kept in memory, and the Court furnishes the means of such recording, but takes no judicial notice thereof.

Although publicity was the object of these documents being brought to the office, that object is not always stated in the Statutes, but it may be inferred from their nature and from analogy; still questions have sometimes arisen as to the extent of the public right of inspecting county records.

Probably the right of inspection extends to all persons as to the county rolls and books of a judicial nature, and to persons interested as ratepayers as to the records of the public concerns, regulated and managed by justices out of the county rate; but whether this right of inspection is general or limited, and howsoever it may be limited, there can be no doubt that the documents are more or less public, and that every one has an interest in their being safely preserved.*

Awards under Inclosure Acts are the most numerous and most important documents of the above class. The collection awards in the office of any county, as compared with the number of Acts for Inclosures in the county is defective, as will be more fully explained hereafter. Accompanying most of these awards are maps or plans. The maps, particularly those made by the Inclosure Commissioners, are on a large scale and on whole sheets. Where they represent

* The records of the courts of law are open to the inspection of every person, and the Court will order inspection if the officer refuse it (*Fox v. Jones*, 7 B. & C., 732); so it has been said that the books of Quarter Sessions are public books, which every one has a right to inspect (*Herbert v. Ashburner*, 1 Wills, 297; *R. v. Barking*, cited; *R. v. Purnell*, 1 Blk., 39; *R. v. Sheriff of Chester*, 1 Chitt R. 477). But the general right of every man to inspect the books of Quarter Sessions was doubted by Abbot, C. J., who said, "We grant a mandamus to inspect corporation books as a matter of right to burgesses who have an interest in the corporation, but I know of no right that this Court has to authorize a person to inspect the books of Quarter Sessions. I cannot accede to the proposition; it is too general. I am not aware that every man has a right to inspect the books of all the Quarter Sessions in England, and say to the clerks of the peace, 'Let me see your books.'"

large tracts, they are liable to be torn and injured by being handled and turned about in searching after particular allotments, and to prevent this the accommodation for inspection in the office ought to be ample.

The General Acts under which awards are to be enrolled are 41 Geo. III. c. 109 (General Inclosure Act), 6 & 7 Will. IV. c. 115 (Common Field Inclosure), 8 & 9 Vict. c. 118 (Commons' Inclosure).

Bargains and sales of estates afford another instance. By the Statute of Inrolment, 27 Hen. VIII., c. 16 (1536), no freehold or inheritance shall pass by bargain and sale of lands unless the same be in writing, indented and enrolled within six months in one of the King's Courts at Westminster, or within the county where the lands lie, before the custos rotulorum and two justices of the peace, and the clerk of the peace, or two of them (the clerk of peace being one). There is a scale of fees to justices and clerks: where the land exceeds not 40s. yearly value, 2s., 1s. to the justices, and 1s. to the clerk of the peace; and where the lands exceed 40s. yearly value, 5s., whereof 2s. 6d. to the justices, and 2s. 6d. to the clerk of the peace for enrolment. The clerk of the peace is to engross on parchment the deed, and deliver the roll to the custos rotulorum, to remain with other records of the county, to the intent that every party that hath to do therewith may resort to and see the effect of the writing enrolled.

This was the scheme of a Register of Deeds, the bargain and sale being the only then known secret conveyance of lands, and which it was supposed would, on account of the virtue given to it by the Statute of Uses, supersede feoffment with livery of seizin. But it was held by the Courts that the Statute of Enrolment did not extend to a bargain and sale for a term of years, and the ingenuity of lawyers turned this decision to profit by their invention of the lease and release form of conveyance. (a bargain and sale for a year, under the Statute, and a

release at Common Law thereupon), by which the condition of enrolment—obnoxious as involving publicity and expense—was got rid of, and the Act as a scheme of registration proved abortive, although the bargain and sale was not entirely superseded. That at first some registration was done in the counties under the Statute appears by a subsequent Act, 37 Hen. VIII. c. 1, which is a complaint against ignorant clerks of the peace, that the deeds of parties brought to them for enrolment were, through their negligence in not duly enrolling them, rendered frustrate.

The object of the enrolment of bargains and sales was expressly declared by the Act to be that every person who had to do with the land might resort to the record, and see the effect and tenor of the instrument enrolled, yet no fee for inspection was fixed. In connection herewith it may be noticed that a Statute for Private Estates Registration was from 1715 until 1791 in force, in the case of persons who declined to take the Oaths of Supremacy, and subscribe the Declaration against Transubstantiation. Such enrolments were to be preserved amongst the records of the county, the object being to facilitate the taxation of such estates. Enrolled here also are proceedings on taking lands in several cases for public undertakings, conveyances of turnpike houses sold, and a recent provision of this kind occurs in the Artisans' Dwellings Act, 31 & 32 Vict. c. 130, s. 29, which directs the registry in the county office of charging orders and accounts.

Books in the nature of records are made up by the clerk of the peace in virtue of his office, and may be called *Records of Office*, as in the instance of jurors' books. These under the name of the Freeholder's book are of some antiquity.

Voters' Lists and Qualifications.—By an Act passed in the 18 Geo. II. c. 18, payment to the land tax was required to qualify a 40s. freeholder to be a county voter, and

hence duplicates of land tax assessments had to be delivered by assessors to clerks of the peace, to be by them kept amongst the Records of Sessions, open to inspection for 6*d.*, and of which copies are to be furnished at 3*d.* for 300 words. These documents were received for each county until the Reform Act of 1832 came into operation, and those received ought to be amongst the records of the county.

As land tax was only on the land itself, and not on annuities granted out of it, the above provision was supplemented by 3 Geo. III. c. 24, for entering in books kept by the clerk of the peace memorials and certificates of the annuities granted out as qualifications. The book to be open to free inspection. The Voters' Register has supplanted all this. That has to be made up by the clerk of the peace, a duty troublesome to him and burdensome to the county.

Besides these, from early times, divers registers and returns of public matters had to be kept and made by the clerk of the peace. The duty of making these registers, &c., was cast on this county officer, partly for the sake of obtaining the stamp of his official authority to their accuracy, and partly for publicity. Others, of the like kind, were brought to him with the latter view only; such as appointments by lords of manors of gamekeepers, which have to be entered with the clerk of the peace, are open to inspection without fee, but for the clerk's certificate 1*s.* 8*d.* is payable (Stat. 9 Anne, c. 25). This has been kept in counties from the date of the Act to the present time. Returns of men able to bear arms: of trained archers, a roll had to be kept by the clerk of the peace (2 Ed. VI. c. 14) for the king's information; of fencible men, horses, and armour, in each county, particulars to be comprised in indentures, one part to be kept by the Military Commissioners, and the other left with the clerk of the peace, 4 & 5 Philip & Mary. So, in more modern times, returns of militia men had to be made to the clerk of peace, and by him to the treasury, 26 Geo. III. c. 107. A register of

recognizances taken on grant of alehouse licenses was required to be kept (26 Geo. II. c. 31, s. 5).

Of Charitable Donations (existing and future).—Memorials by trustees had to be registered by the clerk of the peace in books for a fee of 4s., to be kept for inspection, and furnished with index, and of which a copy might be had at 1s. per 100 words. Stat. 52 Geo. III. c. 102.

Periodical Returns and Statements—as of Turnpike Roads. By Stat. 3 Geo. IV. c. 126, ss. 69, 78, 79, a statement of revenue and expenditure of the turnpike roads in the county has to be transmitted to the clerk of peace, and produced by him at next sessions, and by him to be kept among the records of the county. Charity.—By Stat. 16 & 17 Vict. c. 137, an annual statement by the trustees of charities of the receipt and expenditure of their income had to be delivered to the clerk of the peace, who had to register the same, but without fee. It was open to inspection for 1s., and copies cost 2d. per folio. This is discontinued. By a recent Act the undertakers of Gas Works and Water Works have to send annual accounts of their receipts and expenditure duly audited, to the clerk of the peace in England or Ireland, or to the sheriff clerk in Scotland under a penalty of 20*l*. The account to be open for inspection for 1s. By the Pauper Lunatic Asylum Consolidated Clauses Act, 16 & 17 Vict. c. 97, s. 63, list of lunatics in the asylum of the county is to be sent by the clerk to the visitors of such asylum to the clerk of the peace; and, by s. 64, lists of lunatics in or out of asylum chargeable to unions in the county have to be sent by clerks of guardians to the clerk of the peace for the county half-yearly. The lists so sent, the clerk of the peace is directed to lay before the justices, but no further directions are given in relation thereto.

By the Standing Orders of the Houses of Parliament, documents relating to projected public undertakings, such as railways, &c., are directed to be deposited by promoters of Bills with clerks of the peace.

By 8 Vict. c. 16, s. 161, a copy of a private Act relating to a railway, canal, and other like undertaking of which the works were not confined to one town or place in a county, is to be deposited with the clerk of peace. Inspection thereof to be had as in case of Parliamentary documents. There is a penalty on officers for neglect of making this deposit, but nobody is charged to enforce the penalty.

Official certificates may be given by the clerk of the peace of certain matters in his custody by various Acts; for instance, he had on demand to furnish at a fee a certificate of the convictions of an alehouse keeper for breach of his recognizances. Stat. 26 Geo. II. c. 31, s. 11. The above gives a general idea of the range of a county collection of records. We will now advert to the record office or building.

In a design for keeping things by way of continual remembrance it is strange that the repository where they should be kept should be left to chance. The general law, while it appointed an officer of these records, provided no building for their reception. As they were the Rolls of the Justices, it may have been intended that they should be kept where they held their general sessions, which would be under some roof or other, although there was no general law until recently for providing such roof even for the sessions. Or as they were to be kept by the clerk of the peace, the intention may have been that he should find office room for them in the place of his abode. But no general law ever has been in force for providing a lodging for that officer.

An Act of 9 Geo. III. c. 20, authorised the expenditure of county rates in the reparation of shire halls; and a general Act (7 Geo. IV. c. 63) was passed in 1827 for building new shire halls or buildings. Neither in that Act nor in the amending Acts of 7 Will. IV. and 1 Vict. c. 24, and 10 & 11 Vict. c. 28, is any mention made of an office for county records among the buildings to be enlarged or newly provided.

Local Acts were obtained by various counties for building shire halls, as 54 Geo. III. c. 175 (private) for Gloucestershire;

55 Geo. III., Herefordshire; and others for Surrey, Aberdeenshire, Forfarshire, &c., in which provision was made for record keeping.

The Forfarshire Act (4 Geo. IV. c. 11, private) truly says that "there was no provision by law for determining by what persons or out of what funds, or in what manner the expense of providing county record rooms ought to be paid."

The Surrey Act (56 Geo. III. c. 14) states in the preamble the following weighty considerations as applicable for the establishment of a county records' office in that county.

"As the rolls and other records of the county of Surrey are become very voluminous, not only from the increase of the business of the Court of Quarter Sessions, but from the office of the clerk of the peace having become, under the provisions of several Acts of Parliament and the Standing Orders of the House of Commons, the depository of a great variety of public documents; and as the loss of the records would expose the county at large, and also parishes and individuals, to the greatest injury by the disturbance of their rights, interests, and estates."

These reasons are applicable to several counties still without record offices.

But even if a proper office were provided in each county, and the records safely housed therein, further measures must be required for providing the public with information as to their contents.

Documents in public repositories are not of the use they might be to inquirers, if there be no means of their obtaining previous knowledge of what the collection contains; when there is an absence of expectation of being able to find documents in the office, inquirers will not be induced to come and search there for what they want. For the public to obtain a proper knowledge of the contents of the repository where documents are laid up professedly for their inspection, they must have a guide in the form of a catalogue of the instruments, and an index to their contents. Indeed, without such guide, the officers themselves cannot have a correct knowledge of what

is under their charge, nor can they be checked or called to account for the neglect of what is or ought to have been in their custody.

The law recognised the necessity of indexes in regard to some Registers, as Charity Memorials, &c. But for the making of a general catalogue or index there never was any provision.

It is another requisite that there should be means to maintain the establishment for record keeping.

The remuneration of the recording officer for his trouble about enrolment, certificates, copies, &c.; was by fees. The Sessions had power to fix a table of fees with the sanction of a Judge of Assize, Stat. 57 Geo. III. c. 91. But the fee table can only be applicable where the Statute directing the enrolment, &c., is silent on the subject. Very often it expressly fixes the fee, and that without much regard to other charges for the like service. Thus under the General Inclosure Act and Common Field Inclosure Act, the search fee is 1*s.*, but under the Commons Inclosure Act, 8 & 9 Vict., the fee is 2*s.* 6*d.* The fee for copies in the first case is 2*d.* per page of seventy-two words, and in the latter case 3*d.*

In some cases the Statute directs that the inspection shall be free; thus by the Test Act the rolls of persons taking the oaths of supremacy, &c., here, were hung up in some public place at every sessions, for every one to resort to and look upon without fee or reward.

Parliamentary Bills.—By 7 Will. IV., c. 83, these are open to public inspection at statutory fees. For inspection 1*s.*; for every hour after the first, 1*s.*; and for every 100 words copied 6*d.*

Such being in effect the law on the subject, the important question is, what is the actual state of this provincial Record Institute. There is not known to be any recent evidence thereon. But of old (1690), we learn by a presentment of the Grand Jury of Cheshire, that the records of the county of Chester were spoiling by the rain falling on

them, owing to the state in which the castle of Chester was in in which the courts were held. And the Select Committee of the House of Commons appointed to inquire into the state of the public records (of which Committee, Mr. Abbot, afterwards Speaker and Lord Colchester, was chairman), directed their attention, amongst other records, to those in county registries. They addressed to the clerks of the peace of the several counties a set of questions as to the several kinds of records in their custody, the state of preservation, places of deposit and arrangement thereof, what indexes there were, and what were the fees of search, &c. The Committee obtained returns from the officers or their deputies, and these returns were printed about the year 1800, in one of the large folio record publications. From these answers (which we may suppose were quite as favourable as the facts would allow), a pretty correct, though now a distant, view of the condition of the county documents may be had.

As to their state of preservation, the records of many of the counties had suffered from damp, as those of Anglesea, Carmarthenshire (except the rolls of the last twenty years), Wilts, &c. In Staffordshire they were in a bad state except those of the last thirty years. The papers of Derbyshire, of date before 1760, were mutilated. The Record Books of Montgomeryshire were tattered, with leaves torn out, &c.

The repository was commonly the private dwelling or law office of the clerk of the peace, which, from many circumstances stated, could not be deemed a fitting place.

The Record Books of Sessions' Proceedings of Oxfordshire only went back to 1761. The want of a public building for deposit is assigned by the clerk of the peace (afterwards Judge Taunton), as the cause of the loss of the earlier books. In Anglesea, all papers before 1776 had been in the hands of the clerk of the peace, but he had been dead for seventeen years before the return, and the rolls could not be found after search. They had been before that in a record room in the Shire Hall, but that place had been found to be too damp.

In Leicestershire, the repository was in a private house ; but, says the clerk, a public office is indispensable. In Cambridgeshire they were kept in a private house, those prior to 1793 being in sacks. In Carmarthenshire the rolls were kept by the clerk of the peace. Upon the death of the late clerk, much difficulty was found in obtaining the records from his law office. Some were detained by his widow, who had been frequently applied to, in vain, to give them up. Those of Monmouthshire were in a small private house, damp. The repository for Northamptonshire was also private and damp. Those of Suffolk, however, came to the private house of the clerk of the peace from a worse place. They had been kept in a wooden press in a public house. In Wilts the repository was in the clerk of the peace's house, but some of the rolls were in a decaying state. The rolls of many of the counties were part in a public and part in a private repository. The books of Northumberland were scattered at three or four places. Those of Norfolk were part in the castle, part with the clerk of the peace. A more commodious room was required. The Warwickshire old rolls were at the County Hall, the later documents at the private residence of the clerk of the peace. Of the Worcestershire rolls, some were in old, broken boxes in an unceiled garret, some in militia store rooms, and some in the deputy clerk of the peace's private house, and nothing could be done for their arrangement until they were collected in some public building. The Carnarvonshire rolls had been put in a cupboard of the county kept in a house of the late clerk of the peace, but the present clerk having no room for the cupboard, would not take charge of it or its contents. Yet there was a public building that might have been fitted for their custody. The old Surrey rolls were in the Sessions House, Newington, and modern ones in the deputy clerk of the peace's office at the Temple.

Where there were public repositories, but few of them were

good. Salop had a good one. The Session House for Middlesex, at Clerkenwell Green, was perfectly secure and commodious for the keeping of records, a considerable part thereof having been built for that purpose. In Rutlandshire, the repository was a public building, but it was not secure against fire. Of the Montgomeryshire rolls, some were in the Guildhall open to the market-house, where the locks had been burst open. The West Riding of Yorkshire had a room in Wakefield Castle, but it was inadequate. The result was, that the clerks of the peace were provided with offices constructed at the public expense in twenty out of fifty-two counties. The Committee thought that this should be the case in each of them. But the extent to which this has since been done, except in the counties which have obtained private Acts for shire halls, there is no ready means of knowing.

As to arrangement, the documents were in books, files, rolls, and bundles, mostly in order of time, but some all in confusion (Herefordshire). In only two or three counties was there a complete calendar or catalogue of the public documents, or any index thereto.

In Cumberland, there was a general schedule up to 1780. In Salop a general and complete index. In Berks the records were in bags, with an index to each bag. But several of the counties had partial indexes, &c., to the records. To the books of proceedings in Kent, to some in Suffolk, to most in Derbyshire, to those in Yorkshire, East Riding, from 1711 to 1787.

Some had calendars to the several sorts of books:—Rutlandshire had an alphabetical index to some books, but none to the sessions' proceedings books. Derbyshire had an index referring to the rolls under certain heads. Cheshire had a partial register from 1778. In Dorsetshire there was an imperfect catalogue of documents deposited. But in the greater part of the counties there were no indexes, &c., to the documents, and many of the officers were of opinion that it was

useless to have any. So said the recording officer of Anglesey, for he had not had to search once in forty-seven years. The Surrey clerk said it would be of no utility to index even the Order books of the sessions. In Oxfordshire indexes would be of no good, so said the clerk of peace, afterwards a Judge. In Durhamshire no index was required. In Cornwall there was none, and it was no use to make any. The East Riding of York clerk of peace doubted the use of indexes. But there was a considerable weight of opinion in favour of catalogues and indexes. In Flintshire there was no index, but the clerk said it would be of utility, for the documents being blended together caused great difficulty to parties searching. In Montgomeryshire there was no index, but one would be of great utility. In the Radnorshire Return, it is said that the records of the Great Sessions Court of Wales wanted catalogues, as parties had to search them frequently, and the prothonotary, who resided thirty-eight miles away, charged three guineas for sending a clerk with the key to the repository, to the great inconvenience and expense of professional men. In Hampshire there was no catalogue or index, but it would be very advantageous, and assist searchers if one were made. In Glamorganshire the clerk of the peace found no index made by his predecessor, and he made none himself, but he admitted its utility. In Northumberland a general index of sessions books would be of great utility, and useless papers should be destroyed. In Notts, the clerk of the peace observed that a schedule of documents ought to be taken, and a duplicate signed by the clerk of the peace. In Herts there was an imperfect catalogue, which might be useful if made more perfect. In Huntingdonshire there was no index, but it would be of much utility to have one, as it was difficult for want of it to refer to papers. So for like reasons in like cases Devonshire, Cambridgeshire (as to books of proceedings), Wilts, Warwickshire, Carnarvonshire, Staffordshire, Derbyshire, Leicestershire, York (North Riding). In Berkshire there was none, but it would be useful for

order books. In Gloucestershire none, except of indictments, later deeds and friendly societies' articles; an index to record books would occasionally be useful; to other books it would be of no great utility. In Lincolnshire (Lindsay), and Rutlandshire it would be of great utility if the public documents were arranged and sorted; two-thirds might be destroyed, and regular catalogues made of the remainder.

The House of Commons' Committee summed up this part of the returns by this observation—"The clerks of the peace in general have no catalogues or indexes, and most of them think them unnecessary, but others strongly recommend the measure, and it appeared to the Committee that it would be desirable to have them completed as to all matters concerning inclosures, roads, bridges, gaols, and other county works or buildings, and in every case it would expedient to have one general schedule lodged to go with the records themselves in a public building, and a duplicate thereof left with the clerk of the peace for the daily use of the officer."

Nearly all the clerks of the peace agreed in considering the profits of the office of records to be of small amount. The fees fixed by many of the Acts were deemed by the clerk of Surrey too small to pay for the materials, meaning no doubt, his skilled labour. The clerk of Suffolk thought that the 1*s.* fee for registering game certificates was too low. In Gloucestershire the Deputy-Clerk said the fees averaged 20*s.* But the clerk of the peace, Yorkshire (West Riding), admitted that his fees about records amounted to between 450*l.* and 500*l.* a year. As to search fees—In Monmouthshire, and another county or two, a search might be had gratis. The most usual charge for a search was 1*s.*; as in Surrey, Gloucestershire, Warwickshire, Northumberland, Derbyshire, Norfolk; but in Notts a search cost 3*s.* 6*d.* Fees for search were in some counties so much per year, as in Cardiganshire, 8*d.*; in Westmoreland, Wilts, Dorset, 1*s.* each year. In Warwickshire the charge for search is named as 6*s.* 8*d.*, and in

some other counties higher still. A general search is probably meant. For copies great variation of fees was also shown. You might have 100 words copied for 1½d. in Yorkshire (West Riding); you had to pay for a folio of seventy-two words, 2d. in Norfolk; 4d. in Gloucestershire, Warwickshire; and 8d. in Middlesex, Notts, Derby, Anglesea. Giving certificates varied from 1s. Northumberland to 2s. 6d. Middlesex, Surrey, Worcester, Northumberland.

Nothing seems to have been done by the Committee on this report. But on May 4, 1813, a Bill was brought in by Mr. Holme Sumner for enabling justices of the peace to provide places for depositing county records, and also residences for clerks of the peace and for settling the fees of these officers. The reasons in favour of the Bill were the insecurity of the records in their present state, and their great importance to the property and the interests of many. The Bill was opposed by Mr. Westorn, on the score of expense, and it seems to have been let drop. Ought it not to be revived? If the social life of a people is to be traced in its institutions and ought to be learnt, the repertory for the facts concerning them is the genuine source of instruction, and ought to be maintained and improved.

What a body of information must there not be contained, and what lessons of experience derivable from the books and accounts of administrators, who set down with business-like and judicial accuracy their acts in the management and dealing with institutions and concerns of interest and importance! What incidental information also of the state and circumstances of the localities at different dates, as well as the condition of the institutions themselves! What an amount of local historical matter might be gathered from the entries in the ancient Record books of sessions' proceedings! These in some counties go back to the sixteenth century—those of Cheshire, and also those of Westmoreland, beginning 1559; those of Wilts begin 40 Elizabeth; those of (North Riding) Yorkshire, 1600, and those of Devonshire

same date; those of Notts from Jac. I. The ledger books of Somersetshire go back to 22 Car. I., and they had some earlier in mutilated condition; and even the most recent session books, as of Surrey (1759), Cornwall (1758), Oxford (1761), Berks (1760), furnish the experience of upwards of a century.

When these things are properly considered, it cannot be well doubted that the project for obtaining a proper place for depositing and preserving county records, with provision for their safe custody, and for the easy and convenient access by the public to them should be resumed.

It is desirable that a general catalogue should be made and published of the public documents of the county, by which its inhabitants would be apprised of the nature and extent of their public records: and the clerk of the peace would know the particular documents for the care whereof he is responsible, and by this means a greater degree of attention would be insured to their security and preservation.

It is also desirable that particular indexes should be made to every description of the public records and documents belonging to the county, in order to facilitate the reference thereto by persons having occasion to examine the same.

As to the cost of such establishment, it is desirable to avoid undue increase to public burdens, but there are some things in the way of set off to the necessary expenditure which deserve consideration, as they would tend to its self-support. In counties where the fees of the clerks of the peace are commuted for a salary, the search fees, &c., make on the profit side of the accounts almost the only item, and hence perhaps it is not much regarded. The apostolic maxim about giving and receiving strongly holding where it was never meant to apply, the dealing with public, that is, other men's, monies.

The more rich a county collection is in extent and variety of its records, and the more facility given to their use, the greater the resort of inquirers to the office, and the amount of fees arising from their searches would be.

With a view to encourage resort thereto, a greater uniformity of search and other fees should be established.

In regard to the most important class of documents deposited in the office of the clerk of the peace of counties, namely, Inclosure Awards, facilities should be given for the completion of the collection. The incompleteness has arisen from various causes. Some of the older Acts contain no direction for emolument, and in other cases the directions for that purpose in the Acts have not been complied with for want of funds and other causes, the awards lying in the state of engrossment in hands of solicitors or surveyors claiming liens thereon for fees, or still remaining unengrossed and imperfect.

All awards upon future inclosures should be enrolled with the clerk of the peace, and the option of enrolling elsewhere taken away. Steps should be taken for obtaining transcripts or copies of awards made under Inclosure Acts for places in a county and enrolled elsewhere (as at Westminster, under the General Inclosure Act, 1801), such transcript to be put with the county records. This, in some cases, would, however, be attended with expense, which, to some extent, might be met by the profit of additional searches and copies.

In order that outstanding awards should be brought on for enrolment the provisions of the Stat. 3 & 4 Will. IV., c. 37, should be much better known, thereby, persons entitled to lands, affected by awards, may require that they be enrolled by the clerk of the peace. The expence, however, lies on the applicant. It should be mitigated by reduction of fees in such cases by the county authorities. Resort should also be had to the provisions of the Commons Inclosure Act, 8 & 9 Vict. c. 118, for the completion of delayed awards, and for revival of the powers of Local Inclosure Acts, lapsed by death of the commissioners or otherwise, so as to complete the proceedings.

Inclosure awards are often made in duplicates or triplicate. One copy to be deposited in the parish chest, or with the

largest proprietor, or the like. The parish chest is not always a good repository. Awards, so deposited, often suffer from damp and neglect, and it sometimes happens that the inquirer after an award, which ought to be in the parish chest, or in the hands of the lord of the manor, &c., is disappointed in his search. It is not to be found in its place, and he cannot always ascertain where it is to be found. When found, the facilities for search, which the county office affords, are wanting, and the compensation to be paid to the keeper for the trouble of producing the award, not being fixed by law, may become the subject of misunderstanding. These considerations show the importance of preserving and augmenting the county collection, and lead to the suggestion that where a parish has not fit accommodation for keeping its award, it is the more desirable that the same should be enrolled or deposited in the office of the clerk of the peace, according as its Act may direct.

In conclusion, some collateral or further uses of a County Record Office may be adverted to.

The Record Committee of 1800 were led by their inquiries, to recommend a registration of public instruments relating to land, and they suggested that registers for real property assurances might be wisely established, on the model of the Middlesex and Yorkshire registries, in counties—in effect a revival of the Tudor law of enrolment.

The Yorkshire (West Riding) Act professes to supply the defects of the old Statute, in that it had not appointed a place for keeping of the enrolments, nor provided sanctions binding enrolling officers to their duty.

No doubt it was susceptible of improvement, but it is a question whether a county registry might not be brought to a state of greater perfection than a central or general registry.

In the late inquiry before the Committee on Voters' Registration, a witness from Yorkshire stated that the registry of his Riding was so well kept and entered up, that the state

of a particular title on it might be readily learnt by letter or telegram. The advantage of a county register of property in relation to the correcting of the register of voters was also proved before the same Committee.

The question between central and local registration is still a point of contention, and in which question the claims of local over central registration can never be urged with due force, while the present imperfect arrangements respecting county records continue.

Record offices should be large enough to allow of a proper staff of officers, and proper and safe repositories and convenient accommodation for searching; but when those requisites can be secured, the claims of provincial over central are considerable. The spirit of local investigation should be encouraged by affording facilities on the spot to those whose aim is diligently to learn from authentic sources, facts tending to establish private and public rights, and illustrate antecedent institutions and manners.

To London now go returns of friendly societies, charities, and some other local institutions formerly kept in the County registry; and to London, it is said also, are destined to go the collections of wills and the like records. In the case of charity returns, it is matter of experience that the law for their deposit in the country offices worked beneficially, inquiries being often made by persons interested therein; whether they are of equal use in the central repository of the Charity Commissioners in London may be doubtful.

This project of centralisation is, moreover, fraught with danger to the preservation of the records, as they would be exposed to the attacks of enemies from within and from without. Cade's policy of "burning all the records of the realm" commends itself to revolutionary minds, and as to foreign hostility, we plainly see that modern scientific warfare seeks the destruction to the enemy, of life without measure or discrimination, and of property, however purely conducive to the interests of peace, and civilisation. The county authorities

on their part should reflect that it is wrong to lend to the movement for transferring local collections to a central office, the aid which is furnished by manifest neglect or indifference of local keepers to the objects of their charge.

In connection, though not necessary connection, with this, the county office might usefully serve for a repository of derelict deeds. In his book on Abstracts (Vol. I. p. 28), Mr. Preston, the late celebrated conveyancer, observes:—

“Deeds and even wills are sometimes found in the hands of those who represent the stewards or the law agents of the family of the former owners, or of the gentlemen who have succeeded to the professional concerns of such law agents, &c.

“It would tend greatly to public convenience by facilitating such researches, and be a profitable appointment to any individual, that all deeds, wills, &c., left or found in the hands of persons who have no connection with the property or with the owners, or a table of their dates and the names of the parties, and the description of the parcels, should be deposited in some public office. The existence of such office would soon give it abundance of employment.”

Since Mr. Preston's time, the practice has arisen of casting aside deeds which do not enter into a short title, or are displaced by a certificate of title. This adds force to the proposed means of securing them from destruction, and keeping them out of the hands of those whose dealing therewith may produce profit to themselves but injury to others.

Persons going to the colonies or foreign parts are often embarrassed with the difficulty of knowing how to dispose of their deeds and wills in their absence. The county office might be made a useful place for such deposit.

The Real Property Commissioners of 1832, in their string of questions on a general register, asked whether the registry office might not be used for such deeds at the option of their possessors, or at the suit of owners of partial interests or in satisfaction of covenants for their production.

The respondents agreed upon the usefulness of having a public place for the reception of such documents, but it was

doubted by some of the most experienced witnesses whether it should belong to the proposed registry office. Mr. Bell thought it a distinct matter. "If you choose to make a distinct office for depositing deeds, that may be a very different question." To the above questions Mr. G. Harrison answered—"No; let the register be as fresh as the new and as bright as the full moon without any mist upon it." "It might be very convenient, particularly if there were county registers, to have an office where people could deposit their deeds and wills, but it should be no essential part of the registry office."

That service might be remunerated by moderate fees.

ART. IX.—AMERICAN LEGAL NOTES. By AN
AMERICAN LAWYER.

AN inclination to investigate the laws of other countries, and to institute a comparison between them and the Common Law, is a trait of the English lawyer as marked as it is recently acquired. The works upon the Roman law which have been published by English barristers within a few years, attest the strength of the impulse, and the establishment of the *Revue de Droit International et de Legislation Comparée*, by an English publicist of high standing, in conjunction with continental jurists, is a sign of the drift which modern professional opinion is taking not to be mistaken. It is but natural that with this prevailing disposition, the American law, which is merely a graft upon the English stock, should receive special attention, and no one who handles the law reports can have failed to remark the frequent citations from American text-books and reports in the arguments of counsel and in the decisions of the Courts. As it is of the utmost importance for the development of law that the disposition thus evinced to cultivate comparative jurisprudence should be encouraged, and as it is grateful to an

American lawyer, who has grown up in the quaint realm of Coke, to feel that his title to fellowship in the common heritage is recognised, and his labour appreciated, it is proposed to facilitate the incipient professional intercourse, by giving occasionally in the *Review* a summary of the current events in the United States, which, being strictly confined to professional topics, may be instructive and interesting to English lawyers.

A topic at present in common between the two countries is the revision and consolidation of the Statutes at large, and the feasibility of a digest or code of the Common Law. Experiments of each kind have been made without number in the United States, and new ones are now on foot, with more or less chance of enactment. It is a vital question for the English legislator to understand the effect of the attempts which have thus far been made, in order to act intelligently upon the subject which has already been forced upon his attention. The gravity of the project arises from the irrevocable nature of the change, were it once introduced and carried out. No return to the old system would be possible, after a generation of lawyers had been educated under a code; the connection with the antecedent law, except so far as reference to it might be contained in the code itself, would have been finally severed. A race of lawyers unacquainted with the system, history, and traditions of the Common Law, would have taken the place of the class which now makes that law the subject of its life-study. The inducement to master a scheme so complicated would have been taken away, and none but a legal antiquary would trouble himself about the superseded machinery. It is the failure to apprehend and realise the break with the past, which is involved in a code, that stamps its advocates with superficiality. Thus Mr. Field, of New York, who was mainly instrumental in procuring the adoption of the New York Code of Procedure, has recently published a letter, dated November 28, 1870, addressed to several members of the California Bar, in which he exhorts

them to aid in effecting the enactment of civil, penal, and political codes, in addition to the codes of civil and criminal procedure, which California has already adopted; and the argument which he advances, and upon which he relies as conclusive in favour of a code, drawn from his experience in New York, is that the opposition which manifested itself at first vigorously to the New York Code of Procedure has gradually diminished, and has now almost terminated. This unavoidable acquiescence he considers a silent acknowledgment by the opponents of codification that they were mistaken in their first judgment upon the Code. Could fatuity lead one farther astray? The explanation of the reason which induced the Common Law practitioners to discontinue their hostility is as simple as it is natural. To prolong the struggle would be futile. The younger members of the Bar, a constantly increasing number, have been instructed in the code, but are unacquainted with the Common Law practice, and, should the code be repealed, they would be compelled to begin their legal education anew, and, during the interval of study, be incapacitated for practice. The new generation of lawyers which has come to the Bar within the last twenty years comprises the vast majority of the present practitioners, and the combined influence of this new race precludes any reconsideration of the question. The body which should be free to deliberate upon the procedure which it ought to adopt receives such a set and bias through its interest and one-sided knowledge, that it is incapable of arriving at a just conclusion. Is the opening of an abyss which isolates us from the accumulated stores of past generations to be heralded as an advance? As well might the capital of the world be destroyed at a blow, on the pretext that we might begin afresh, unencumbered with antiquated rubbish.

But what is the practical result of the New York Code of Procedure? If the opinion of the leader of the Bar, a lawyer, not of clap-trap fame, but of thorough erudition and training, is desired, it may be found in the first volume of the *Albany*

Law Journal, page 302. Mr. O'Connor shows that the framers of the Code, in attempting to simplify the practice, succeeded in producing confusion; and the exclamation of Mr. Field, that our law is a chaos, applies, as all will admit, to his pet subject of simplification, the practice of New York. Mr. O'Connor, after mentioning that the Code requires the facts which the evidence tends to prove, but prohibits the evidence itself or the conclusion of law from the facts to be pleaded, says, "It requires somebody much more wise or more subtle than myself, or any special pleader I have ever been acquainted with, to define or find out what it is that should be stated in a regular pleading drawn in compliance with this requisite of the Code. I am not aware that any one has ever attempted to do it. The common practice in this State is, to tell your story precisely as your client tells it to you, just as any old woman in trouble for the first time would narrate her grievances, and to annex, by way of schedules, respectively marked A, B, C, &c., copies of any papers or documents that you may imagine would help your case. This is most emphatically a fair description of all the pleadings which come from the office of the chief codifier himself. A demurrer to any pleadings under the Code is a very dangerous slip, because it is utterly impossible for the keenest investigator to determine, in most cases, what any other reader than himself will understand to be the import of the pleading if it be demurred to."

The United States' Bankrupt Act of March 2, 1867, was meant to embody the results of the English decisions and Statutes. It was prepared by a lawyer of eminent ability, Mr. Jencks, of Rhode Island, who thought he had simplified the subject to its last elements. But the attempt is a failure. It would have been far simpler to have incorporated the English law as it stands, just as English Chancery jurisdiction is conferred, in some States, upon the courts. Multitudes of cases have already sprung up to test the meaning of the enactment, and twenty years and a hundred volumes of reports

will be necessary to reduce the interpretation to an intelligible basis. The English cases, instead of being any help, are armouries out of which the lawyers equip themselves, to fight the controversies out anew. The forms of procedure, which were proclaimed as models of simplicity, are more cumbrous than any of the old real actions at Common Law. This is the last example of codification, though there is at present a Commission sitting daily at Washington to revise all the United States' Statutes, and the Commissioners to revise the Parliamentary Statutes have recently published their draught of the *Revised Statutes*, which they recommend the legislature of that State to enact.

The old question, "Who is wiser than the wisest man?" and the answer, "All the world," bring out the relative superiority of the Common Law over any code. A few individuals, no matter how able or erudite, cannot expound the law in all its departments in detail, and no generalisation, unless made with a clear view of all the instances that might be comprehended under its terms, would be an adequate expression of the law, which it attempted to epitomise. As the law now stands it resembles a natural science. Every lawyer in the kingdom and in the colonies, and in most of the United States, so far as he is able to elucidate any one section of the entire body of law, contributes to the work of simplifying the system. Nor is this aid a trifle, like the investigations of the naturalist in remote quarters of the globe; it often illuminates the subject, and gives the clue for a philosophical classification, which is final, and not only puts an end to conjecture in that department, but reflects light upon the entire inter-dependent system. An illustration will make the meaning clear. The subject of General Average has attracted a great deal of attention in England and on the continent of Europe. The propriety of calling an international congress, in order to enact a code upon this subject, has been advocated (XVI., *Law Magazine*, 322), and numerous other suggestions have been made to settle artificially this single principle.

Fortunately no such straight-jacket was ever put upon it, but it was left as it is, embodied in the precedents. A man with a mind of diamond-like clearness, and of first-class magnitude, found the question involved in a case which arose in his practice in Ohio. He applied himself to the investigation of the subject, and mastered it. His treatment of the doctrine is as finished a piece of analysis as can be found in legal literature. It is published as a note to *Johnson v. Chapman*, in the American edition of 19 Common Bench Reports, N.S., 583. Let any one who desires to witness the process by which the Common Law is simplified examine the Hon. R. P. Spalding's argument on General Average.

The accumulation of reports requires, it is true, a digest of all the cases which continue in authority, in order to render the vast bulk of precedents accessible. Reference to the digest itself may be facilitated by indexes, which should give the points of decision without any statement of facts, and by a logical analysis which should display the inter-dependence and coherence of the entire system. But this must be in aid, and not in exclusion, of the present law. The moment a digest becomes an authoritative exponent of the law, *its* version is substituted for the original, and as the language of the summary is authentic, its interpretation takes the place of the decisions, which it supersedes. The work once completed must be done over again, and in a method always imperfect because of the inadequacy of language to convey with perfect precision the thought of the writer. The clever description of President Lincoln's message: "Thought struggling for expression," is true to a greater or less extent of all languages. This *Review* has already explained the difficulty in Volume XVIII., p. 322, at length.

Reports multiply in the United States with alarming rapidity. Each State has its regular official reports of, on an average, three or four volumes a year, which are limited to cases decided in the highest State tribunal. The decisions of the lower courts are also frequently reported, and in the

large cities these local reports accumulate in unexampled numbers. Thus Barbone's Reports of one district court in New York number fifty-six, all published since 1848.

A volume of the Pa. State Report has just been issued, December 30, 1870, being No. 62 of the present series, but No. 126 of the entire set of the Reports. It contains a case, *Pa. R. Railway Company v. Kerr*, p. 353, which at first sight seems to conflict with *Smith v. London and South Western Railway Company*, L.R., 5 C.P. 98, but in reality differs widely from it. The sparks from a locomotive set on fire a warehouse situated near the track, and from the warehouse the fire was communicated to a hotel thirty-nine feet distant, which was consumed with its contents. Suit was brought against the railroad company for damages suffered by the destruction of the hotel, and they were recovered in the court below; but the supreme court reversed the judgment on the ground that the ignition came from the warehouse, and not directly from the locomotive. A secondary cause operating through and by means of an intervening cause is too remote to create liability. In *Smith v. London and South Western Railway Company*, heaps of hedge-trimming were left by the servants of the railway company near the track during a season of unusual dryness, and caught fire from the sparks of a passing engine. A high wind swept the fire across a public road and stubble field, and set fire to a cottage 200 yards off. The plaintiff recovered compensation from the railway company for his goods which were burnt up in the cottage. The court held that there was negligence on the part of the railway company in leaving the dry heaps near the track during such a season. Had the warehouse in *Pa. R. Railway Company v. Kerr* been the property of the company, and had it been negligently erected so near the track as to be in danger of ignition from passing locomotives, the direct and intermediate cause would have been consolidated into one immediate cause attributable to the railway company; the erection of the warehouse would then

have been viewed as a piece of negligence which resembled leaving the heap of hedge-trimmings in a like exposed position.

Clark v. Douglass, p. 408, turns upon the conclusiveness of a judgment. A defaulter joined with his wife in executing a mortgage of her real estate to his surety for the unas-
certained amount embezzled, and they subsequently confessed judgment for a sum which they liquidated as the indebtedness. On a feigned issue between the creditors and the surety the record did not show what issue had been tried, but the Court said the only question which could have been presented to the jury was collusion between the defaulter and wife, and the surety to defraud the creditors. The creditors offered to prove that the defaulter paid the surety 12,000 dollars over and above the debt to compound the felony, but the offer was overruled, on the ground that though this was collusion to defraud the Government, it was not collusion to defraud the creditors; as to them it might have been a matter of defence, which was concluded by the judgment. To impeach the judgment on any ground except collusion would be illogical, as otherwise it would stand as to the defendant in it, and at the same time be void as to the creditors. But query? for if a man with an intention to commit a fraud does an act which, if coupled with the guilty intention, would amount to a different fraud, is not the intention joined by law to the act in order to establish the fraud? At the Common Law, if a man shot at a dog, the property of another, and in so doing killed a human being, he was guilty of murder. In the above case the argument is *à fortiori*, because the act is the same, and may be viewed as a fraud with a double aspect, if the party is not allowed to define his own guilt.

Schuretz v. Shreeve, p. 457; decides that the implied power of a partner to bind the firm by an executory contract does not enable him to do the same thing by an instrument under seal. The seal alters the character of the liability created; it implies a consideration, and takes away the period

of limitation. An agreement by one partner for his firm to deliver petroleum was held not binding in consequence of a seal being attached to the signature. *Edwards v. Tracy*, p. 374, adheres to the law as it stood in England before *Cox v. Hickman*, 8 H.L., 268, and *Bullen v. Sharp*, L.R., 1 C.P., 86. The agreement was that one firm should receive a commission on the sale of goods commissioned to them by another firm equal to one-half of the profits, and should be liable for one-half of the losses. According to the old distinction that a commission equal to one-half of the profits is a very different thing from one-half of the profits, it was decided that a partnership did not result from the agreement. *Guremeyer v. Southern Mutual Insurance Company*, p. 340. The insured sold a mill, and took a judgment for the balance of the purchase-money. By the sale he lost his insurable interest, as the judgment is not a specific lien. And *Peel v. Elder*, p. 308, decides that adultery, unless accompanied by voluntary separation from her husband, does not bar a wife of dower under the Statute of Westminster, 13 Edw. I. c. 1, s. 34. Elder abandoned his wife and removed to Tennessee, where he obtained a divorce. It was invalid, however, as the wife's domicil, being distinct from that of the husband in proceedings for a dissolution of matrimony, remained in Pa., and the Courts of Tenn. had no jurisdiction. During his absence she cohabited with one Pickel. On his return he remained with her a short time, and then left her and married another, and it was during the second marriage that he conveyed the property to Peel. The wife's indiscretion was induced by the husband's neglect, and the Court saw no reason to deprive her of dower.

ART. X.—NEW BOOKS ON ROMAN LAW.

The Commentaries of Gaius. Translated with Notes, by J. T. ABDY, LL.D., Regius Professor of Laws in the University of Cambridge, and BRYAN WALKER, M.A., M.L. Cambridge: The University Press. 1870.

A Compendium of the Modern Roman Law. By FREDERICK J. TOMKINS, Esq., M.A., D.C.L., and HENRY D. JENCKEN, Esq. London: Butterworths, Fleet Street. 1870.

The History of Roman Law, from the Text of Ortolan. By ILLUDUS S. PRICHARD, Esq., F.S.S., and DAVID NASMITH, Esq., LL.B. London: Butterworths, Fleet Street. 1871.

NO subject is more interesting to those who have taken interest in the movement, which has gone on of late years, for providing a higher legal education than the attention which has been given to Roman law and jurisprudence. It was lately shown in these pages,* that in England the civil law began to be studied at an early time. But this promise was not fulfilled. The study of Roman law, which on the continent never ceased until its influence culminated in the production of the French code, never took a deep hold in this country. On the continent, lawyers who were bewildered with the technicalities and the multiplicity of forms of their own systems, turned their eyes to that of ancient Rome, as to one which presented examples of order, method, and elegance. They found their own systems encumbered with legal forms. They saw how that of Rome had been so encumbered; but they saw also how the legal genius of the Latin race had shaken these encumbrances off. They saw instead, an appeal to intention, law looking to the spirit and not to the letter merely, the application to cases under dis-

* See article on Vacarius.

cussion not of mere technical rules, but of a few simple principles, to which any number of cases might be referred. They saw confusion in their own forms; laws in one district, or in one town, differing essentially from those in another; ceremonies so complex, that they almost hid the nature of the transaction they were intended to evidence; and laws in such variety that it was impossible that any one person should be acquainted with them. But in Roman jurisprudence, order reigned instead of confusion; and the law was not only common to all Romans, but was a true common law of races, a *jus gentium*, which had seemed even to the Romans themselves so characterised by simplicity and equity, that they had come in later years to regard it as a *jus quod naturalis ratio docuit*, a true *jus naturale*. Cumbersome ceremonies had not been allowed to obscure that which they evidenced. Intention had been everything, ceremony nothing.

It is not, therefore, to be wondered that continental lawyers, and especially French lawyers, should have looked towards Roman law almost as an object of affection, should have regarded it as an unattainable model to be imitated, have believed that it had been divinely inspired, have considered its decision final upon any question on which it had pronounced judgment. There came a time, as Professor Maine has pointed out, when the mass of the community came to be influenced by the *jus naturale* and its teachings. The doctrine "passed from the forum to the street." The lawyers' belief in the system of Equity, of which they had gained glimpses, had spread among educated men, and when at length the law of nature came to be accepted as a reality by Jean Jacques Rousseau, all France, and after her all Europe and civilised America, followed his example. It is true that the new law of nature was not the old *jus naturale* of either Gaius or Ulpian, and that it was still more unlike the old *jus gentium* of early Roman jurisprudence; but as the law of nature of the later jurists had grown naturally from the old law of nations, so the law of nature of Rousseau and

the writers of modern times had sprung naturally from the *jus naturale* of the classical jurists. Rousseau spoke of man as being in a state of nature—the ancients as governed by the law of nature. When the classical jurists pronounced that *jure naturali omnes homines æquales sunt*, they meant that looking at men by the light of the theory of the law of nature all men before the law were equal; the distinction, for example, between debtor and creditor, between citizen and *latinus*, between *paterfamilias* and one under his *patria potestas*, in the eyes of that law had ceased to exist. But when Rousseau and his crowd of imitators in Europe and America declared that all men are equal, they meant that all men *ought* to be equal, and they enforced their argument by the assumption that in a state of nature all men would be equal.

What modern literature and modern civilisation owe to Roman law, and especially to the theory of a *jus naturale*, it is almost impossible to over-estimate. Probably our own law owes less to it than that of any other country, and there can be no doubt that the weak points of our legal literature are exactly those which would have been improved by a more thorough acquaintance with Roman law. Our system of Equity jurisprudence, which in its doctrine of trusts, of fraud, accident, mistake, mortgages, and other portions, has been built upon the principles of the great classical system, has formed a body of law, the existence of which has rendered the working of our old Common Law system possible. To Roman law modern Europe owes also the system of international law, a system which borrows its first fundamental assertion, that all nations are equal, directly from the *jus naturale*. With most of the European nations, and in the States of Southern America, in the province of Lower Canada, and in one of the United States (Louisiana), Roman law constitutes the principal basis of their unwritten or Common Law. We have already said that it has had much to do with the formation of our own Equity system, while

in the jurisdiction of our Admiralty Courts its influence has been still more direct and exclusive.

"Roman law," says Chancellor Kent, "is now taught and obeyed not only in France, Spain, Germany, Holland, and Scotland, but in the islands of the Indian Ocean and on the banks of the Mississippi and the St. Lawrence." On the ground, therefore, that Roman law is the basis of the jurisprudence of the civilised world it is well worthy of study. But it has other claims to recommend it. "Next to the writings of the geometricians," says Liebnitz, "there is nothing which in force and subtlety can compare with the Roman law." But even Liebnitz and the great men of his generation had not such opportunity of becoming acquainted with this subject as the labours of the eminent jurists of Germany have enabled us to have. At no previous time since the great school of Roman jurists passed away has the subject been so thoroughly taught and systematised as it is at present in both Germany and France. In England, unfortunately, it is only within the last few years that anything has been done towards providing a course of training in Roman law. Until the appearance of one work which we have named at the beginning of this notice (*MODERN ROMAN LAW*) no complete systematic treatise on the modern civil law has appeared in English. The language is indeed destitute of any treatise whatever on the subject of Roman law which will bear comparison with any one of fifty works produced on the continent. We have been almost altogether dependent on translations and adaptations for anything worthy of the name of explanation or commentary, even on the "*Institutes of Justinian*." Four years ago a student was utterly unable to get the slightest assistance in English either in the form of translation or explanatory note of the "*Commentaries of Gaius*." He had to get through the original Latin with all its technical words and phrases in the best way he could, blundering on until he discovered by native wit that words which he

had learned to recognise in Cæsar or Cicero as having one meaning had quite another, and, so far as his dictionaries were concerned, an unnoted meaning here.

This difficulty will be met by the translation of Gaius, by Professor Abdy and Mr. Bryan Walker. The student has before him in this edition the original text, in its clear, manly Latin, side by side with a rendering in English. On each page are a number of carefully prepared notes, explaining to the student the difficulties of the text, with the meaning of technical words (his greatest difficulty at the outset), and giving such historical notices as are requisite for its elucidation. The edition is a very clear and definite gain to English legal literature; is, in fact, almost a model of what such a book should be. At first we were inclined to take exception to the use of the old form "hath" for "has," but as its use is not general throughout the book, the subject is hardly worth speaking of. In one or two places the translation might, we think, have been in simpler English. Professor Maine's translation of *Is emptus est hoc ære æneaque libra*, "I have bought him with the copper and the scales" is preferable to (although not so literally exact) "he has been bought by me by means of this coin and copper balance," which is the way the passage reads in Professor Abdy's translation. These, however, are mere matters of detail. The great point to be noted is that this edition is carefully annotated, and possesses a faithful translation. As a student's edition it could hardly be better.

Both the books we have named open up to Englishmen an entirely new field. Our fathers, of course, knew nothing of Gaius till the fortunate discovery by Niebuhr of the famous palimpsest. As one reads its wonderful pages, stumbling at every few lines on lacunæ, denoting where some wretched monk has succeeded in effacing the legal treatise to make way for the probably wretched trash which covered it, it is impossible not to feel that without Gaius a comprehension of the spirit of Roman law, of the history which has

made Roman law what it is, was impossible. His wonderful glimpses into the legal history of his country, his descriptions of the ancient *legis actiones*, his account of the *mancipatio*, and of other old ceremonies, all throw a light on ancient history, probably clearer than that which has been shed by any other ancient author. In point of clearness of perception of what he was writing about, Gaius excels even all Roman jurists. The editors of the present translation think, and with good reason, that his commentaries are to be regarded rather as a book of practice than as an institutional treatise. Whether this be so or not, there can be little doubt that a work so complete in itself, giving a comprehensive view of the whole body of Roman law, clear and precise in its definitions (take for example, his sections on theft, and the difference between *furtum manifestum* and *furtum nec manifestum*), and yet so short, must have been used as a text-book for instruction in law. That it was so used is of course rendered the more probable from the facts that Tribonian selected it as the model for the formation of the "Institutes of Justinian," and that whole passages are transferred bodily into the latter from the former.

We have said that two of the books named at the head of this notice open up new fields to our legal students ignorant of French and German. To the third book, "Ortolan's History of Roman Law," translated by Pritchard and Nasmith, the same remark will apply. The present writer had occasion some years ago to wish to make himself acquainted with Roman legal history, and for this purpose took the trouble of examining the wonderful manuscript catalogue at the British Museum. He was unable to find a single work on the subject; and believes that none such has hitherto existed in the English language. In one or two works, as in those by Cölquhoun and Graepel, he found a few pages on the subject, but these were generally imperfect. Anything, however, like a history of Roman law in English was not to be found even in that huge storehouse. We can

therefore give a welcome to this translation of Ortolan as cordial as we have extended to each of the two works named. Among those who have made Roman law a subject of study, M. Ortolan's name stands in high estimation. His "Institutes of Justinian" are a model of what such a book should be. In England, undoubtedly the best known work on the same subject is a translation from Ortolan, with substitutions, adaptations, &c., which justify the author in not calling it a translation. But in our opinion, in spite of the considerable ability which has been displayed, the work to which we are alluding does not approach in excellence to that of Ortolan. The latter author is especially successful as an elementary writer. He cares nothing about repetition. He summarises admirably. He brings out the points of importance, recapitulates wherever necessary, and adds at the end of each important division a *résumé* which is invaluable to the student from the careful way in which all the points of the preceding chapters are gathered together. We know of no book which in our opinion exhibits so perfect a model of what a text-book of law should be. Story could probably have given us a work on Equity jurisprudence framed on the same model; but nothing we yet possess in English can be compared as a book for legal education with Ortolan. His work on Roman law is now the text-book in the London University. It consists of three volumes, the second and third being devoted to a translation of, and explanation or running commentary on, the "Institutes of Justinian." The first volume consists of an "Histoire de Législation Romaine," and of a "Généralisation du Droit." It is this volume (which as will be seen from the title is complete in itself) that Mr. Prichard and Mr. Nasmith have translated. We have already expressed our opinion on the original work as a whole. In some respects the first volume of Ortolan is however the most valuable of the three. It is possible to gain elsewhere fair commentaries on Justinian's text, but Ortolan's excellence as a teacher and as a writer profoundly acquainted with

Roman law at its sources, as well as with the writings of modern German and other jurists comes out especially in the History and Generalisation. Besides which, it should never be forgotten that Roman law ought always to be studied in connection with its history. Nothing better shows the spirit of that law than a comparison between certain institutions as they are described in Gaius, and as we have them finally set forth 300 years later in the Institutes of Justinian. By the aid of such a comparison we can see the principle on which improvements were made, and by the light of subsequent experience can point out pretty certainly what direction of growth the law would have taken in subjects which were not fully developed even in Justinian's time. But, without a knowledge of Roman legal history, the subject becomes to a great extent one of more or less dogmatic teaching. The mistakes made through ignorance of such history are sometimes ludicrous. We recently heard a divine of some eminence inform an audience that the Roman law did not allow a citizen to make a will, *because* it was not until the time of the Twelve tables that such permission was given; a statement which, to say nothing about its inaccuracy, is about as reasonable as to assert that trial by jury or a writ of Habeas Corpus are not English because not mentioned in the code of Alfred.

Ortolan's definitions are master-pieces, and his explanations leave nothing to be desired. Of the translation before us it is enough to say, that it is a faithful representation of the original. There are a few places where the exigencies of translation have pressed hardly on the translators, as, for example, in their definition of one of the meanings of *persona*, "every being considered as capable of having or owing rights,"* &c. The original is, we believe, *capable d'avoir et de devoir des droits*, an expression singularly neat but incapable, as our readers will see, of being readily rendered into English. The word *droit*, like the German *recht* and the Latin *jus*

signifies duty as well as right, just as in old English the word right, still commonly used in this sense in the north of England, as in, "He has a right to make it good," meaning, it is his duty to make it good, had the double meaning. These are small blemishes, for which the language is responsible and not the translators. In one respect we could have wished that the translators had imitated M. Ortolan;—in the cheapness at which his book is published. The three volumes, containing upwards of 2000 pages, are brought out in Paris for 22½ francs. It is true that the French edition is on that thin blotting paper with which we are all familiar in French books, and that it is ill stitched, and in paper covers. But, on the other hand, we get for less than nineteen shillings a mass of matter in good type such as in England we could get in no law book whatever under at least two or three times that amount. At the same time, it is only just to Mr. Prichard and Mr. Nasmith to say that, comparing their books with other English law books, it is singularly cheap at the price. As a mere specimen of publishing its get-up is admirable and is a credit to Messrs. Butterworth. The same remark will apply also to the *Modern Roman Law* of Messrs. Tomkins and Jenckens. Ortolan's *History* is furnished with a chronometrical chart, which will be of great use to students of Roman legal history, and for which its readers are indebted to Mr. Nasmith, whose admirable chart of English History is well known.

The question of what proportion of time ought to be devoted by the English law student to Roman law is one which is too wide to be discussed on the present occasion. We, however, cannot refrain from expressing our regret that in the course marked out by the Council of Legal Education, a greater share is not given to it. One Reader takes international law, jurisprudence and Roman law. Dr. Tomkins may well regret that no time is given to modern Roman law, but we plead for more time to the general subject. The educational term contains, we believe, about twenty lectures,

and there are three such terms in the year. The mere statement of the case is sufficient to show that the time devoted is too short. While on the subject it is impossible to refrain from expressing our very cordial agreement with the authors of "Modern Roman Law" in their remarks on the necessity of an improved style of lecturing. Our readers must have fresh in their memory what was said in these pages, by another writer, of the lecturing of Von Vangerow. Such lecturing is of immense value, but a lecture on any legal subject, which is a mere formal reading, is simply a waste of time. A student can still make more progress in almost any subject of study with the aid of a tutor than solely by the aid of books, provided the tutor does not attempt a formal lecture. Mr. Haynes has published his admirable lectures on Equity before the Incorporated Lay Society, and very useful and even pleasant reading they form for an Equity student. But it is surely better that he should have them before him in a printed form, in his own chambers, so that he may read a sentence again, and get a complete grip of the whole subject in the exact words of the lecturer, than that he should have to make, possibly, many long journeys to hear them delivered, and come away with a few imperfect notes.

We are not prepared to say that lectures may not be useful. There are men at the Bar who have paid attention to special subjects, who are full of curious knowledge on particular points, and whom a considerable number of the profession would be glad to hear. These men have gathered information from a great variety of sources and are possibly averse to writing. In any case, such information as they have to give can be more pleasantly received *viva voce* than from reading, even though the lecturer himself can be induced to commit his researches to paper. But the case is altogether different with a student of elementary law. It is not merely that he has to waste time in attending lectures, and any one who has had experience in attending the lectures of the Council of Legal Education, or who will take the trouble to

examine the time table of their lecturers will see what a large amount of time is wasted, but it is that when he has reached the lecture-room he will hear in many cases worse matter than he could have read at home. The truth is, that the old system of lecturing is a mere remnant of the mediæval university system, and requires now very material alterations to adapt it to modern wants.

We have been led into these remarks by Dr. Tomkins's observations on the importance of an attempt being made by a lecturer to do something to evoke the sympathy and arouse the ardour of his pupils. His remarks apply with special force to the teaching of Roman law. This subject, in England at least, has been so little treated of that the beginner will for a long time find invaluable help from attendance at lectures, if the lectures are of the right kind.

Of Dr. Tomkins's book it is impossible to speak at any length. But we commend it earnestly to those who wish to make themselves acquainted with Roman law as it exists to-day. Roman law has never ceased to be a system in actual practice. The barbarians who conquered the Eastern and Western empires were in turn conquered by the legal genius of their captives. The codes of the victors, incorporating usually a good deal of customary law pertaining to the conquering races, were yet in the main Roman. Those of Theodoric II. and of Lothair, the *Lex Romana Visigothorum*, the *Breviarium Alaricianum*, and of Alaric II. laid the foundations of the legal systems of every country in southern and central Europe. Roman law in some European countries forms the Common Law of the country, speaking like our Common Law when the Statutory Law is silent; in regard to the indigenous law of Germany, it occupies "not only the position of an auxiliary supplemental code, which becomes silent when Statutory Law speaks, but it has moreover entirely supplanted many peculiar Germanic juridical doctrines and institutions." It is of this modern Roman law that Dr. Tomkins's book treats. The learned authors

have founded their compendium on the treatises of Puchta, Von Vangerow, Arndts, Franz Moehler, and the *Corpus Juris civilis*.

The publication of each of these three books opens a distinct field in the progress of legal education, and is an evidence that the profession will soon have in their hands works which will place them on a level with those possessed by law students in France and Germany. As an instrument of legal education Roman law stands pre-eminent, not merely because it can be mastered as a whole in a way in which no other legal system can be mastered, but because it forms the basis of almost every system of jurisprudence in Europe and America, and has, even in its modern form no less than its ancient, formed the subject of comment by the most able jurists whom the world has produced. As complete believers in the historical method of study we are glad to give the heartiest welcome to M. Ortolan in his English dress, and to the excellent edition of Gaius, while, as tending to make the dry bones live, we are glad to see in English, for the first time, a treatise on "Modern Roman Law."

ART. XI.—THE LAW OF COMPENSATION FOR CLOSED CHURCHYARDS.

QUESTIONS of considerable interest, not only to the profession but to the public generally, have been recently decided upon the matter which is the title and subject of this article, and as it appears to us that there is some discrepancy, or variance, between the decisions upon it of the Court of Chancery and of the Court of Common Pleas on the one hand, and those of the Court of Queen's Bench on the other, we propose to consider all those decisions together, being only four in number, with a view to enabling the reader upon a comparison of all of them to form his own opinions with regard

to the consistency or inconsistency of each. Of the four decisions two have been in the Court of Chancery, one in the Court of Common Pleas, and one in the Court of Queen's Bench. The question for decision has been slightly different in each of them, having sometimes been the principle of the assessment of the compensation, sometimes the person entitled, and sometimes the proportions in which different persons are entitled, to the compensation payable by public bodies for the old and long disused churchyards, taken by them in the exercise of the usual compulsory powers of purchasing and taking lands. The case in the Queen's Bench was *Stebbing v. The Metropolitan Board of Works* (23 L.T. Rep., N.S., 530-535), that in the Common Pleas was *Hilcoat v. The Archbishops of Canterbury and York* (10 C.B., 327) and those in the Court of Chancery were *In re St. Pancras Burial Ground* (L.R., 3 Eq., 173-392) and *Campbell v. Mayor and Corporation of Liverpool* (L.R., 9 Eq., 579-586) together with the subsidiary cases of *Ex parte the Rector of Liverpool* (23 L.T. Rep., N.S., 354), and *Ex parte the Rector of St. Martin's, Birmingham* (23 L.T. Rep., N.S., 575-577). It will be more convenient, and also more conducive to perspicuity, to commence with the decisions in the Court of Chancery first.

In the case of the *St. Pancras Burial Ground* it was held by the present Lord Chancellor (when Vice-Chancellor) that the persons who had been entitled before the closing of the burial ground to receive the burial fees on account of interments made in the churchyard, notwithstanding that they had ceased from the date of the closing thereof, that is to say, for over ten years, to receive any such fees, were nevertheless entitled to receive anew, or rather in lieu of the old burial fees, the full amount of the dividends or income of the purchase or compensation money, paid for a part of the old churchyard taken by a certain railway company in the years 1863-4, for the purposes of their railway. The material parts of the Lord Chancellor's judgment when stated in brief are as follows:—

“If the burying ground had not been closed when the property was taken by the railway company, I should have ordered the money to have been invested in consols and the income to be paid to the same persons as had theretofore received the burial fees. . . . But the ground having at the date of the purchase by the company and for some time previously thereto been closed by an Order in Council, it was in a state of complete suspension *quâ* burying ground at the date of the purchase. The Order in Council under which it was closed against burials operates as an inundation might have done, which would have rendered the burial ground unproductive until the water was drawn off, or drained off, from it. And if a railway company had taken it while in this unproductive state, they would have taken it subject to the rights thereto, or interests therein of the persons entitled to the burial fees; for the inundation, although it had depreciated, had not destroyed the land itself and those rights and interests therefore would have survived the flood; in other words, the disqualification having been removed by whatever cause (whether Act of Parliament or other act), the land would have remained as before subject to the old rights and interests.”

Again, in the case of *Campbell v. Mayor and Corporation of Liverpool*, Vice-Chancellor Malins held, and chiefly upon the authority of the *St. Pancras Burial Ground* case, that the Corporation of Liverpool, notwithstanding that it had originally been itself the grantor of the land forming the burial ground in question in the case, and notwithstanding also that by a like Order in Council to that before mentioned such land had in effect, or practically, ceased to be a burial ground, that is to say, was become divested of the uses for which it had originally been given, was nevertheless not entitled by reason merely of the practical determination of those uses to repossess again as by reverter of their old estate the land which had some time thereinbefore been a burial ground, but that on the contrary the fee simple of the land forming the burial ground remained in the original grantees of the Corporation and their successors, and could only be regained or re-acquired by the Corporation upon the usual terms of

purchase or the payment of a fair equivalent. And the same Vice-Chancellor, in the two subsidiary cases of *Ex parte the Rector of Liverpool* and *Ex parte the Rector of St. Martin's, Birmingham*, before mentioned, awarded in each of them to the rector for the time being, as the person theretofore entitled to the burial fees, the full amount of the dividends accruing upon the investment of the purchase-money, the dividends being taken in each case to represent and to be in lieu of the burial fees; and the circumstance that for a series or succession of years there had by reason of the closing of the burial grounds been no payments at all made to the rector on account of the burial fees, did not appear to the Vice-Chancellor to be at all material to the question which was before him for decision, although he indeed remarked that the rector had had a windfall.

Turning now from the decisions of the Court of Chancery in this matter to the decisions of the Courts of Common Law, we shall consider first the case of *Hilcoat v. Archbishops of Canterbury and York*, and secondly, or lastly, the case of *Stebbing v. The Metropolitan Board of Works*,—the former of those cases being the decision exclusively relied on by the plaintiff, and also exclusively quoted by the defendant, in the latter case. In *Hilcoat's case*, Wilde, Chief Justice of the Common Pleas, in affirmance of the verdict of a jury held in effect that the plaintiff Hilcoat, as incumbent of a certain church and owner of certain consecrated property adjoining, was entitled in respect of his said twofold interest to obtain from the defendants, the Archbishops, such a sum of money as would represent a fair proportion of the purchase money for such land paid or payable by a certain local railway company to the Archbishops; and that his proportion of such compensation money ought to be fixed or ascertained upon the following principle,—that is to say, the property taken by the company was to be regarded as having *eo instanti*—upon the taking of it become divested of its spiritual character, and re-invested with its original secular one, and

its value therefore to the incumbent, Mr. Hilcoat, was to be assessed upon the latter assumption, and not upon the former one, so that *the disqualification* theretofore attaching to the property, by reason of its consecrated character, as it was in fact removed by the operation of the Lands' Clauses Act and the action of the Company, so it should be taken to be removed for the advantage of the plaintiff also equally with the Archbishops and with the company itself; and in consequence of this decision the plaintiff's proportion of the compensation money was raised from 300*l.*, at which it had before been estimated, to the sum of 1500*l.*

And now coming lastly to *Dr. Stebbing's case*, we find in this case the first hitch, or apparent hitch, in the harmony of the decisions which have been given in the matter. The Lord Chief Justice of the Queen's Bench and the other judges of that Court with him, there held that the plaintiff in respect of his freehold interest in the closed-up burial grounds in question, as rector of the parish or united parishes to which such burial-grounds belonged, was entitled only to so much of the purchase or compensation money paid or payable by the company (The Metropolitan Board of Works), the purchasers of the said grounds, as represented or was equivalent to the actual present value to him of the said lands from the time that, and during the years that, the said grounds had been closed, that is to say, a value so slight as to be scarcely (if at all) appreciable in pounds, shillings, and pence. The material parts of the Lord Chief Justice's decision when stated in brief are as follows:—

“ Two circumstances, and not one circumstance only, must be taken into account in determining the amount of the compensation or purchase-money payable to any one in respect of lands compulsorily taken from him by a company,—and those two circumstances are (1.) The amount of the interest which the person has in the land taken; and (2.) The quality itself of the land in which that interest exists. The land, for example, might be a piece of waste land; in such a case the vendor's interest therein, however

large, would be sensibly diminished in value by the inferior quality of the land. And so is it with the plaintiff's interest in this case; that interest was doubtless a freehold one, but then it was an interest in barren land, that is to say, in land which had long ceased, and ceased for ever, to be productive to him in the only way that it had ever been productive to him before, and in land moreover which he could never by any act of his have rendered productive again in any other way. Now all that the plaintiff is entitled to receive *is the loss which he has actually sustained*; but that is *nil*, or at least inappreciably small, as appears from what I have already stated. And the mere circumstance that the land taken by the company assumes in the company's hands immediately it is taken a very considerable value, does not raise in the plaintiff any equity or any right at all, either in justice or in reason, to insist upon participating in the value so restored to the land. I am therefore of opinion that the rector, the plaintiff in this case, having a freehold interest in the land, and that freehold interest being of no value, is not entitled to be compensated according to the value which the land acquires when transferred to the Metropolitan Board of Works, the defendants. The truth is that the land is but taken from one public body to be given to another; and the plaintiff's individual interest having ceased, the public alone are interested in the matter."

We have now put it in the reader's power to judge for himself whether or not the decision of the Court of Queen's Bench is consistent with the previous decisions, or whether it is not rather an innovation upon the law, a violent interference with the rights of property, and indeed a modern "spoliation of the monasteries."

ART. XII.—THE CASE OF THE EX-NAWAB OF TONK.

WE have received a printed statement of facts in support of a petition by the ex-Nawab of Tonk to the House of Commons, praying for a trial. The facts set forth are in themselves very curious, and disclose one of those sudden outbreaks of violent passion with which readers of Indian history are familiar. Broadly stated they are these:—The Nawab of Tonk, acting on the advice of the Viceroy, Sir John Lawrence, determined to carry out in his State a number of internal reforms, constructing roads, establishing police, &c. The Nawab is a Mahomedan. His most powerful feudatory was however a Hindoo—the Thakoor of Lawa. Tonk is surrounded by Hindoo States, and one can easily understand that a continual state of plotting against the reigning Mahomedan body will be almost the normal condition. The fort of this feudatory it is alleged was the shelter and asylum of robbers. This, again, did not increase the good feeling between the sovereign and his subjects. The feudatory was himself a young man, the management of his State being mainly in the hands of his uncle. On August 1st, 1867, this uncle, accompanied by many of his followers, called at the residence of the minister of the Nawab of Tonk, and finding him ill and unable to see visitors, returned about nine in the evening similarly attended. Then followed a fight. One Mahomedan officer was killed, and seven Sepoys were wounded. On the other side, the uncle and fifteen of his followers were killed. This is by one account; the other gives ten of the Lawa party and seven of the Tonk as the victims. An inquiry took place on the part of the Indian Government, and in the middle of November, in the same year, the Nawab was informed that he was to be deposed. The Nawab at once obeyed.

Now upon these facts the first conclusion is clearly this, that if the deaths of these eighteen men can be shown to have been the result of a deliberate plan by the Nawab, not only did he fully deserve deposition, but even a still severer punishment. If this were a slaughter in cold blood, no punishment could be too great. But it is necessary to show, before the Nawab receives punishment, first, that the incident was anything more than a free fight in Indian fashion; and, second, that the Nawab can be in any way connected with the carnage. In other words, it is necessary that a thorough investigation of the whole of the circumstances should take place, in order that justice should be done; that the deposition should be confirmed, if the facts point to his guilt; that the Nawab should not, on the other hand, suffer any further loss, unless there can be no reasonable doubt in the minds of those who have investigated the subject, that his guilt is made out. What the Nawab claims is, that he shall not be condemned unheard; that he shall have the same presumption of innocence in his favour which is not denied to any person, however much the facts may appear against him, who is charged with a breach of the criminal law. He complains that the justice which has been meted out to him is too much after the Jedburgh fashion, of hanging first and trial afterwards. He asserts that he is prepared to show that he had no connection whatever with the fray; that it was either wholly accidental, or brought about by the insolent conduct of the uncle and his followers; that these went uninvited to the minister's house, forced an entrance, behaved with insolence, and provoked a struggle; but that on any ground there is not the smallest evidence to show that the attack was premeditated, or was in any respect the result of his orders, or done with his approval.

Now, upon these facts, in accordance with the rule which this magazine has always followed, we give no opinion whatever. We say further, that no one would be justified in giving a decision upon what is, after all, but an *ex-parte*

statement of facts, and that a proper conclusion can only be arrived at as the result of a careful investigation. But the facts are such as appear to us to call for an investigation. The statement of the case against the Nawab seems to be this: that the minister invited the Chief of Lawa to Tonk under pretence of redressing his grievances, that the Chief accordingly went to Tonk with fifty of his retainers—the whole occurrence sounds like a tale out of the history of the highlands of Scotland—that on the day of the affray, the uncle with a few followers called on the minister about noon, when he was well received, and returned well-pleased with the interview; that in the evening of the same day the minister sent a messenger to the Chief requesting him to wait upon him; that, accordingly, the uncle of the Chief, with about fifteen followers, went to the minister's residence, arriving there about 9:0 p.m. They were all admitted. The uncle and three others were invited upstairs and then set upon and murdered. The remainder were similarly attacked and all killed but one.

The version given by the other side of course differs widely from this. The Nawab declares that being extremely anxious to set about the reforms urged by the Viceroy, he found his leading opponent in these reforms in the Chief of Lawa. With a view to making some arrangement the Chief was invited to the capital. He consented to come, bringing with him, as we have seen, a number of retainers. The uncle visited the minister at noon, on the 1st of August. The minister was ill and unable to see the uncle. This gave offence to the latter, who is asserted to have used threatening language. Here comes the first discrepancy between the two accounts. The Tonk version represents the visit paid at noon as unsuccessful; the Lawa version makes such visit out to have been altogether successful. The Tonk story is that the minister was unable on account of illness to see his visitor. The Lawa version is that he not only saw him, but that the uncle was extremely pleased with what had taken place; obviously,

therefore, it is worth while trying to get at the facts here, and when an investigation takes place the first point to direct attention to will be the question of the minister's illness. Much turns upon this, because, not merely does it help us to form some notion of the respective credibility of the parties, but it forms a guide to point to us what was the *animus* with which the second visit was paid. If the minister saw them and the interview was satisfactory, then the subsequent Lawa version, that a messenger arrived in the afternoon, inviting the uncle and his party to pay an evening visit, becomes probable. If, on the other hand, it can be shown that the minister was really ill and had been ill for some time, and that in consequence he was unable to have an interview with the uncle, then the Tonk version, that the uncle went away angry and discontented, and uttering threatening language, is exactly what, judging from the character of the Lawa party, one would have expected to find happening.

The evidence on this point is gone into in the papers before us, and without attempting to give it, it is impossible to help saying, that the facts brought forward are such as to throw the very gravest suspicion on the story that the minister received the uncle. The Tonk party assert distinctly that they can prove incontestably that the minister was ill, and unable to receive any visit whatever. This, then, is the first point which should come under judicial investigation.

Another curious and suspicious feature in the case is, that different versions are given of the affray by the Lawa party. In addition to the one we have already given, and by a man who is alleged to have been the sole survivor, a second version appears as having been given by a writer who, if he were telling the truth, must have been an eye-witness of the events he describes. He asserts that the attendants on the uncle were killed by a volley discharged by the minister's sepoys. The former version was that they were killed with swords. But we should weary our readers if we attempted to

point out the discrepancies in the account given of the final slaughter. As we have already said, they all point to the necessity of further inquiry—inquiry which should be full and searching. Upon the whole case it is impossible to help making this remark, that if the Nawab of Tonk be guilty, that is, if he induced his minister to bring about the massacre of his enemies in the way alleged, then the Nawab must be one of the greatest dolts living, for a more clumsy massacre was never devised. No one, with an average amount of sense, would dream of murdering a man's uncle and a few of his servants in order to get rid of a rebel chief, or having conceived such a project, would carry it into execution in the way alleged.

DIGEST OF CASES IN COURT OF SESSION (SCOTLAND) ON QUESTIONS OF GENERAL APPLICATION.

1.—28 Jan., 1869.—*Inglis v. Inglis*.—41 *Jurist*, 234.

LEGACY—WIDOW.

By a settlement a sum of money was bequeathed to the testator's grandson in life-rent, and on his death one half to go to his lawful heirs. He died without children. His widow claimed the one half of the bequest as heir in movables to that extent. Her claim refused. Per Lord President (Inglis). "The question is whether a widow claiming her legal rights is in any sense the heir of her husband? I am of opinion that she is not, and that however loosely the term "heir" may be used in a settlement, it can never comprehend a widow claiming *jure relicte* on the death of her husband. The character of heir of every class, whether of heritable or movable estate, is based on a right of succession to the deceased in respect of the right of blood, and does not involve, in any sense or degree, a *jus crediti*."

2.—29 Jan., 1869.—*Glasgow and South Western Railway Company v. Rain*.—41 *Jurist*, 237.

RAILWAY—RESPONSIBILITY.

A cattle dealer hired a truck, loaded it, and sent it without any one in charge. At Stafford some of the cattle were found dead, and others injured by overcrowding. There was no proof of negligence on the part of the company. *Held* not liable Per Lord President (Inglis). "The pursuer hired a waggon for a special purpose, and having loaded it himself he seems to have been very much in the same position as if the waggon was his own; this is an entirely different relation between the parties from that which ordinarily exists between the sender and the carrier in the conveyance of goods."

3.—30 Jan., 1869.—*Lang v. Lang*.—41 *Jurist*, 240.

PARENT AND CHILD.

Held that a father is not to be deprived of the custody of a pupil child merely because his wife has obtained a decree of separation on the ground of cruelty, but it has not been shown that the health or morals of the child will be endangered—per Lord Benholme. "It was pressed on us that the English judges have looked rather to the hardship which a wife separated from her husband, through no fault of her own, would suffer in being deprived of her chil-

dren than to the interests of the children themselves. It may be quite true that in England the statutory powers of the Judges exceed their common law powers in regard to this matter, but it must be remembered that at common law the powers of the English Judges are very limited. With regard to ourselves, I cannot hold that under the statute (Conjugal Rights Act) we have any wider or more extensive powers than we have at common law. On the other hand, I do not think that our statutory powers are more limited than our common law powers. In this case we are not exercising our statutory, but our common law, powers, and it is, therefore, necessary to consider only the limits of the latter." "Our common law justifies an interference with a father's right to the custody of his pupil children only when it can be shown that the children's health, life, or morals will be endangered by their remaining in their father's custody."

4.—28 Jan., 1869.—*McBride v. Williams*.—41 *Jurist*, 241.

SLANDER—PRIVILEGE—MALICE.

Held on an issue of slander, false and calumnious, without malice, (but malice was alleged in the record) where the defendant raises in defence the plea of privilege, then the pursuer can meet it with proof of malice. Per Lord Ardmillan—"In an action of damages for slander, where there may or may not be privilege, the question whether malice shall be put in issue depends on the Pursuer's averments. If he has himself brought out the privilege, he must meet it by putting malice in the issue. If privilege does not come out on the pursuer's record but is alleged by the defender, an issue is allowed without malice, but whenever privilege appears in the proof, malice becomes essential to the Pursuer's case. If he has not alleged malice in his record the case is gone; if he has alleged malice on the record then the issue, framed on the absence of privilege, did not contain malice, he is entitled to prove malice to meet the privilege. There is a certain amount of legal malice involved in every slander; where there is no privilege there legal malice is presumed. When privilege is instructed the presumption ceases and malice must be proved."

5.—2 Dec., 1869.—*Straw v. Dow*.

JURISDICTION—ARRESTMENT TO FOUND JURISDICTION.

A trader became bankrupt and arranged a settlement in a composition with his creditors. He took up his residence in England. A creditor who had accepted the composition raised an action to set it aside on the ground of fraud, and to reduce a conveyance of the Scottish Heritage made by the bankrupt, and for payment of his original debt. The jurisdiction was founded first on the heritage being really the bankrupt's property, and second on an arrestment of a debt of 11. 8s. 6d. due by a debtor in Scotland. Defence, no jurisdiction. The Court sustained the jurisdiction on both grounds. Per Lord President (Englis)—"If the pursuer's allegations be true

the defender is in reality the owner of the estate, which was apparently carried by this fraudulent disposition, and as it is heritable estate in Scotland that is sufficient to create jurisdiction against him. It seems to be thought that the arrestment is for a debt of too small an amount to found jurisdiction. The sum of 1*l.* 8*s.* 6*d.* is a substantial sum of money, and it is no objection to the jurisdiction that if a decree be obtained that will be all the creditor can recover to satisfy a claim of 800*l.* Unless the thing arrested be of no value at all, I think the smallness of the amount is no relevant objection to the foundation of jurisdiction."

6.—5 Nov., 1869.—*Executors of General Sir Thomas Menzies Douglas*.—41 *Jurist*, 268.

SPECIAL CASE FOR OPINION OF COURT—LEGACIES.

Held that legacies to be paid out of certain funds were general legacies, and so payable out of residue, where the special fund was insufficient, the Court holding the direction as to the source of payments merely demonstrative and not taxative. (Authorities Lord Eldon in *Deane v. Test*, 9 Vesey, 146, and many other English cases.) *Held* that a bequest of "my swords, uniforms, and all other personalities, except such as I may specially bequeath to others," did not carry the residue of the testator's movable estate.

7.—6 Feb., 1869.—*Wardrope v. Goseling*.—41 *Jurist*, 280.

PARENT AND CHILD,

Trustees applied for the appointment of a factor to receive a sum payable to pupils, on the ground that their father, their legal administrator, was in embarrassed circumstances. The Court refused the application. Per Lord Justice Clerk (Moncrieff)—"We are not in a situation in which we can say that the interests of the children require us to deprive a parent, against whom there is nothing said but that he is poor, of the rights which the law gives him."

8.—16 Feb., 1869.—*Muir v. Bryden*.—41 *Jurist*, 282.

PRINCIPAL AND AGENT.

A party for a time acting as the seller's agent was held liable for other purchases, as the purchaser, because he received without challenge invoices wherein he was stated as the purchaser, and he did not divulge the names of the parties to whom he sold these goods. Per Lord Cowan—"Under the law where an agent sells goods to third parties, he is responsible for the price to his constituents, unless he timeously reveals the names of those to whom he sold them, so that recourse may be had against the true purchasers."

9.—20 Feb., 1869.—*Caledonian Railway Company v. Fleming.*

RAILWAY—JURISDICTION.

The Railway Consolidation Act excludes all review by superior court of proceedings before justices. Justices dismissed a complaint for a railway offence because of delay in bringing the complaint. The Court of Justiciary, notwithstanding the clause of exclusion, recalled the judgment and remitted to the justices to hear and decide the case. Per Lord Justice General (Inglist.)—"No principle is better fixed than that a judge is bound to exercise his jurisdiction when properly called upon to do so by a person having an interest. If he refuses he commits an excess of jurisdiction. Their refusal is as much an excess of jurisdiction as if they had gone beyond the statute altogether."

10.—23 Feb., 1869.—*Thomas v. Waddel.*—41 *Jurist*, 296.

BANKRUPTCY—PACTUM ILLICITUM.

A friend, to facilitate the settlement of a bankrupt, agreed to pay a creditor a sum on the bankrupt obtaining his discharge, on condition that the creditor gave up a preferable claim on the estate. In an action for payment, held that the arrangement, though unknown to the bankrupt, and the general body of creditors was illegal and so could not ground an action. Per Lord Justice Clerk (Moncrieff). "I do not think there is anything in the case which can lead us to the conclusion that the nullity is to apply only where the estate is diminished or the interest of the creditors affected in the amount of estate to be distributed, to force a composition contract on an unwilling creditor is a strong act of legislative authority which can only be gratified on the assumption that the vote of the majority is freely and purely given."

11.—25 Feb., 1869.—*Pearce Brothers v. Irons.*—41 *Jurist*, 302.

CONTRACT—LIABILITY.

Engineers furnished a pinion to a mill-owner. The price was paid. It did not work satisfactorily and was repaired. After fourteen months the pinion broke because of defective construction. The engineers then supplied a new pinion. In an action for the price—*Held*, they could not recover. Per Lord President (Inglist.)—"This is not the case of goods sold and delivered. When a man buys goods, pays for them, and takes delivery, there is an end of all controversy, and he cannot afterwards raise the question whether the other party has fulfilled the contract, unless a latent imperfection in the article has been subsequently discovered. But these principles are not applicable in the case of machinery. You cannot tell whether it is efficient till it has been tried, and that can only be done on the premises, where it is intended to work, and accordingly it often happens after machinery has been erected it goes well for a

time, but afterwards shows defects, which the party who has furnished is bound to remedy."

12.—3 March, 1869.—*McIsaac v. MacKenzie*.—41 *Jurist*, 323.

ASSESSMENT—MILITIA ACT.

The Militia Act (17 & 18 Vict. c. 106, s. 36) exempts from assessment buildings for keeping militia stores. An assessment for poors' rates was laid on buildings rented for that purpose. Plea for the assessment, that the exemption only applied to public buildings and not to private property, which would be conferring a benefit on an individual. *Held* (Lord Kinloch dissenting) that the exemption applied. Per Lord Deas—"The *place* is neither to be valued nor assessed if it be a place provided for keeping militia stores." Per Lord Kinloch—"The assessment is on the owner or occupant respectively in respect of the property. When the commissioners of supply purchase the property, and it is occupied by the militia, they will be free from assessment as owners or occupants. When they merely rent the premises they will be free from the occupant's assessment. But the owner, of whom the property is held, will be held liable to the owner's assessment just as before."

H. B.

Notices of New Books.

[*.* It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

Commentaries upon International Law. By Sir Robert Phillimore, D.C.L. Vol. I. Second edition. London : Butterworths. 1871.

OF no time in the history of Europe may it be more truly said than of the present, that International Law, regarded simply as the *jus gentium* to which civilised nations should be anxious to yield obedience, is on its trial. Nor can it be said that its influence is now felt as of much account with even the most advanced nations. The apparent open disregard of the binding authority of treaty engagements, as shown by the recent notes of the Russian Chancellor on the Black Sea question, and that of Count Bismarck in the matter of Luxembourg; the predominance of purely physical force in the determination of international differences; the apparent futility of efforts made to bring belligerent States to an agreement by more pacific methods; all these facts point to the paramount need of advancing, if it be possible to advance, the Public Law of Nations to that position which would enable it to force upon States in their mutual intercourse, the recognition of, as Sir R. Phillimore expresses it, the external obligations of justice.

We therefore welcome with much satisfaction the appearance of a second edition of Sir R. Phillimore's well known work upon International Law, re-edited in view of recent events, and with the object of showing, as the learned author observes in the preface, that however "violence, oppression, and sword law," may now prevail in part of Europe, the belief of mankind ought not to be shaken, but should still rest upon justice, the common concern of all men, the only true policy of all States. The authority of this work is admittedly great, and the learning and ability displayed in its preparation have been recognised by writers on public law, both on the Continent of Europe and in the United States. Still it is a question whether it has yet attained that prominence as a Commentary upon the *jus inter gentes* which its merits ought perhaps to have secured for it, and which has obtained for the work of Wheaton, for example, so wide a celebrity. We proceed, however, to give in outline some account of the subjects of which the present volume treats; to do more is not practicable within the limited space at our disposal.

The internal and external relations of States with each other gene-

rate, as in the case of individuals, certain rights and obligations, which, as forming the basis of International Law, it is the object of the introductory portion of the book to illustrate and define. These lead to the chief division of the entire subject into the departments of Public and Private International Law respectively, the latter term being co-extensive with that of comity, or the relations to be observed towards the individual members of a foreign State. As regards the Public Law, binding on civilised communities viewed as moral persons, its origin is, as in the case of individuals, derived from the Divine law—*leges Divine*—as its primary, and positive legal institutions as its secondary, source. And it is with much research, and an almost eager display of learned quotation, that Sir R. Phillimore illustrates* his position—not, we may remark, by any means one universally conceded—that these sources of law were recognised by civilised nations of old as binding on them in their international relations, though in the case of the Roman Empire the statement may be accepted with greater certainty than with other ancient communities. The presence, however, and influence of the Divine, or rather the Christian element in the Law of Nations, has probably led, though not to the extent attributed to it by Sir R. Phillimore, to the morality of treaties and international usages being largely increased, many customs being now regarded as outrages on the Law of Nations which in less civilised times were allowed, or openly insisted on, as legitimate incidents to belligerency, or to contractual obligations formed in time of peace.† The historical value of the Roman Civil Law too, as explanatory of the terms and sense of treaties and the language of jurists, is illustrated in the work before us by copious citations from the opinions of civilians and the judgments of Courts of Maritime Prize; and the great influence which custom has upon the rights and duties of States—an example of which is to be found in the principle of reciprocity, so remarkably enforced by Sir W. Scott in two of his most celebrated decisions‡—meets with full discussion.

Leaving the chapters which treat of the sources from which the Law of Nations springs, we come (Pt. II., ch. i.) to the subject-matter with which chiefly the Law of Nations deals, namely Sovereign States, the, as Sir R. Phillimore expresses it, “proper primary and immediate subject of international jurisprudence.” The origin of these societies, how they are defined, the conditions with which they must comply in order to be regarded as independent, and the incidents to the subordinate position of those communities which exist in a greater or less degree of subjection to more powerful States, these questions, together with that (ch. vii.) of changes in a State, are here discussed, though rather more in the spirit of one who has prepared a careful Digest of the law, than in the light of international

* Ch. iii., sec. 24.

† See this question examined from a different point of view by Mr. Austin, *Jurisprudence*, Vol. I., pp. 178, *et seq.*

‡ The *Heinrich* and *Maria*, 4 Rob. Rep., 54. The *Santa Cruz*, 1 Rob., p. 65. See also the *Maria*, *ibid.*, p. 350; Phillimore, Vol. I., p. 40.

jurisprudence. And yet the subject is one which admits of, and, indeed, invites a more philosophical treatment. The Swiss Cantons, the (late) Germanic Confederation, the United States, and the Central and South American Republics, exhibit so many separate varieties of the original type of sovereign or independent State, though each distinguished from the other, and also from that form of government known by the name of empire or monarchy, by the presence to a greater or less degree of the principle of federation, which serves to modify—at least, as far as domestic administration extends—the normal conception of an independent State. But it is impossible not to observe that Sir R. Phillimore contents himself with giving but an historical analysis, no doubt very complete, of these several species of national life, and a citation more or less exhaustive of the opinions of writers who have treated of them,* without attempting to point out to the student that higher and more philosophical method of investigation, which would lead him to inquire into the principles which underlie the surface of these societies, and which impose upon them the need, of which, perhaps, they are themselves unconscious, of selecting, in order to the independence of their national existence, one form of government rather than another.

The volume before us proceeds to deal, after noticing questions connected with rivers, straits, and inland seas as subjects of public property, with the important and interesting subject of acquisition, or the mode in which an accession of territory, previously subject to a foreign country, or a territory hitherto unoccupied, is acquired by a sovereign State, although we think that here also a reference to the important view taken of this doctrine by Mr. Maine in his work on "*Ancient Law*" (ch. viii. p. 244), might properly have found a place. But the extracts given from the more prominent treaties, and those conventions through which this department of jurisprudence has been given effect to, and by which it has entered into the actual transactions of mankind, add much to the value of the work as a book of reference, and are in fact, as we remarked of the earlier portion of the volume, a Digest of the Law of Nations on the subject. Our space only allows us to mention that in proceeding to discuss (ch. xviii.) the right of jurisdiction over persons, Sir R. Phillimore notices the important question of naturalisation, and refers to the recent Act passed last Session for amending the law relating to the legal condition of aliens and British subjects.† The volume ends (Part IV.) with an instructive and learned chapter on Intervention, in connection with the Right of Self Defence, and the Preservation of the Balance of Power, in which the student will find an outline of the recent history of this latter question, together with a summary of diplomatic papers, and of the opinions of those writers who have treated of the doctrine. And with this necessarily imperfect sketch

* Among which, however, the works of Mr. Austin find no place, an omission for which, on any theory of the work, it is difficult to account. The student should consult the chapters upon the Constitution of Sovereign States—Jurisprudence, Vol. I., pp. 268, *et seq.*

† 33 Vict. c. 14, passed May 12, 1870.

we must conclude our notice of the first volume of a work which forms an important contribution to the literature of public law. It may be doubted, indeed, whether its usefulness has not been sacrificed to the mass of learning, legal as well as classical, which on all sides almost oppresses the reader, a fault—for so it must be regarded—from which the more modest work of Sir Travers Twiss is free, and which therefore causes the latter book to be the subject of more frequent reference, both by the student and practitioner, than Sir R. Phillimore's more elaborate volumes. Perhaps something too may be put on the score of that absence of imagination which in some writers, Duer for example, and Dana, serves to lighten with choice phrase, or happy illustration, even such a heavy subject as International Law, making less weary the statement of doctrine, or formal citation of case or treaty. From this Sir R. Phillimore's book is absolutely free; and it is therefore to be consulted mainly for the information and learning, varied and exhaustive, which it supplies. In this point of view the book is of great utility, and one which should find a place in the library of every civilian.

The Law of Blockade. By H. B. Deane, B.A., of the Inner Temple.
London: Longmans & Co. 1870.

THIS is a fragmentary contribution to the literature of a large subject. It is an essay which obtained, in 1869, the International Law Prize at Oxford, and, for that reason, was considered by the author and some friends—in whom the critical faculty would not appear to have been present to any distressing extent—to be worth publication. The fate of prize essays has become proverbial, and we cannot say that the present *brochure* is an exception to the rule which assigns to such compositions a diminished value. It consists, in fact, of little more than the names and titles of the works of some of the best known writers on the law of blockade; and it contains, also, what purports to be an account of the doctrine, as far as it is to be collected, from the leading decisions of Sir W. Scott. Of the decisions of the American Courts, in cases arising out of the recent civil war, and under which the Law of Blockade has undergone such important modifications, the author does not appear to have ever heard. And, although this little book is not uninteresting as the effort of a young student to treat of an important subject, the information it does contain is far too general to allow it to be of much value as a guide to the branch of Maritime Law of which it professes to treat.

A Selection of Leading Cases on the Hindu Law of Inheritance, with Notes. By the Honourable John Bruce Norton, of Lincoln's Inn, Barrister-at-Law, Advocate General of Madras, and Member of the Legislative Council. Part I. Madras: C. Bt. Cruz. London: Stevens and Haynes. 1870.

WE can find nothing but praise for the very useful and exhaustive

work under notice. Its author, an able lawyer and a man of indefatigable research, taking Smith's Leading Cases as his model, has applied the system adopted in that work to the Hindu Law of Inheritance, which he proposes to treat under fourteen heads. Of these heads eight are confined in Part I., and the remainder will be found in Part II., which is promised in six months. The subjects treated of in Part I. are Marriage, Studhan, Maintenance, Adoption, Guardianship, Benamee, Coparcenary, and Pension. One noticeable portion of the work is the Appendix, which in Part I. occupies rather more than one-third of the entire volume. The utility of this appendix will be seen when we explain that in the cases and notes in the body of the work constant reference is made to Menu Nareda, the Daya-Chaya with Metachshua, the Smriti Chandulia, and other less known Indian authorities. Now, wherever one of these authorities is referred to, a verbatim English translation of the text of the passage is given in the Appendix, and thus the necessity of consulting the original is obviated. When Part II. is issued, and the work is complete, no Indian lawyer's library ought to be without it.

A Manual of the Hindu Law ; for the use of Students and Practitioners. By Standish Grove Grady, Barrister-at-Law, Recorder of Gravesend, Reader on Hindu and Mohammedan Law, and the Laws in force in British India, to the Inns of Court, Author of "The Law of Fixtures and Dilapidations, Ecclesiastical and Lay," and joint Author of "The Law and Practice of the Crown Side of the Court of Queen's Bench ;" Author of "The Hindu Law of Inheritance," "The Mohammedan Law of Inheritance and Contract," and Editor of "The Institutes of Menu and of the Hedaya." Wildy & Son, London. D'Cruiz, Advertising and Printing Co., Limited, Madras.

WE have already availed ourselves of the opportunity of examining and reviewing, at the time of their publication, the works above enumerated, by the same author, and although we bestowed commendation on the "Hindu Law of Inheritance," when it appeared, as a work admirably adapted to meet the wants of the Bench and the professional practitioner, yet we anticipated that it would not be found to be elementary enough to convey to the beginner a knowledge of the principles of Hindu Law. We are glad to find that the author has made that discovery for himself. No doubt, in discharging his duties as Reader on Hindu Law to the Inns of Court he felt that the student required information upon the law of a more elementary character than his work on "The Hindu Law of Inheritance" was capable of imparting ; not that we think the student would be justified or could dream of dispensing with the latter, for, after he has familiarised himself with the principles of the law, he will require a

more recondite and practical work elucidating the principles which he has already acquired.

The work before us professes to be a mere Manual for the use of students, but both the bench and the profession will find in it a work of practical utility as embodying principles with which they frequently require to refresh their memory during the conduct of a suit. It has long been a stigma upon the schools of law in both England and India, that no steps had been taken by the heads of our Legal Seminaries, or by the Indian Government, or by the Civil Service Commissioners, both here and in India, for the purpose of providing elementary legal works for the education and instruction of the vast number of gentlemen who are employed in the Civil Service in administering the law to the natives of India. But that they should be compelled to draw their knowledge of the law from works published forty years ago by authors, no doubt, of the highest legal learning and reputation as lawyers and scholars, is matter of surprise and regret, particularly when we know that errors must have crept into these works in consequence of the great disadvantages under which their authors laboured in preparing their works for publication, arising from their ignorance, more or less, of Indian languages, especially Sanscrit, within which the law had been locked up, few text books being known or accessible to them through translations; the conflicting authorities of the various schools, rendered still more so, by the discordant, inconsistent, or contradictory comments, or explanations of glossators; the difficulties of separating the living doctrines of the law from its fossil principles; and when we add to all these, the inherent obscurities of the code itself, often based upon fantastic analogies or upon religious doctrines, hard for the western intellect to apprehend; and last, but not least, the absence of any clear line of distinction between the illegal and morally reprehensible, so significantly pointed out by the *factum valet* doctrine of the Bengal school, these obstacles, no doubt, enhance our admiration of the singleness of purpose, acuteness and depth of research, which enabled those writers to evolve order out of such a chaos, and to present in a readable form and succinct compass, the doctrines of Hindu law. But these very obstacles at the same time engendered, and prove, the reasonableness of the objections that have been raised against those works, and account for the errors that have crept into them, and which our more intimate acquaintance with the sources of the law, enables us to detect, and justifies the condemnation of those works as obsolete and unsuited to convey a correct idea of the existing state of the law which, during the long period alluded to, has undergone, like our common law during the same interval, great changes and modifications. Yet these are the works, no doubt, in the absence of more recent publications, which are placed by the Civil Service Commissioners, both here and in India, in the hands of students, who are thus compelled to carry an obsolete law for administration amongst a people who are by nature lawyers themselves, and who soon discover the ignorance and shortcomings of those who

preside over them as judges. We are indebted to Mr. Grady, as must also all those who have the welfare of India at heart, for the pains he has taken to remove this blot from our legal institutions, and we hope they will not be slow to recognise his labours. The work under review is admirably adapted to meet the requirement alluded to. It embodies in a form suited for a beginner the living principles of the law. It points out the decisions which have been overruled by more recent declarations of the law as laid down in the High Courts and in the Privy Council. The work contains very full chapters on the sources of the law, on marriage, adoption, minority, property, charges on property, disqualifications for inheritance, alienation (*a*) *inter vivos* (*b*) by will, inheritance or succession, partition, and the law of contract. The author intends it as a companion work to his Mohammedan law of Inheritance and Contract. Mr. Grady has very clearly pointed out the divergence in the different schools, marking the distinctions in each, so that it is adapted for each of the schools of law. He has attempted to supply the want of new editions of Strange and Macnaughten by embodying all therein that is now law, and has pointed out those doctrines which are not supported by the authorities cited, and has added the principles of recent decisions, without encumbering the work too much by reference to the names of cases, which often only tend to perplex and distract the student. We observe that the work is dedicated to Sir Edward Ryan, the Chief Commissioner of the Civil Service, and Vice-Chairman of the Council of Legal Education. We need hardly commend it to his especial attention as "a work most needed in his department, and one capable of removing the stigma that attach to us for sending out to India Civil Servants who have but imperfect knowledge of the laws they have to administer."

The Mayor's Court of London Procedure Act, 1857, with Notes and an Outline of the Practice, &c. By J. P. Yeatman, of Lincoln's Inn, Esq., Barrister-at-Law. London: Wildy. 1870.

TWELVE months back, in an article "The City Courts" (Vol. XXVIII, p. 208), we referred to this very useful City Court. The year just closed has still further increased the business in the Mayor's Court, while that in all the superior courts has diminished, and the dislike for County Court practice appears in no way abated.

This little book professes to be a guide to the procedure and practice of this most useful City Court, and certainly a reliable guide would just now be much prized by suitors. We regret to say that a perusal of Mr. Yeatman's manual does not enable us to recommend it. The author is evidently not himself a practitioner in the Court, and although, as he acknowledges in the preface, he has "borrowed very largely" from the Registrar's able work on the practice, we fear that a suitor relying solely on our author would find himself frequently embarrassed.

The author seems a strong partisan for corporation privileges, and considers the Court a Queen's Court, quite equal to the superior courts at Westminster, and some rather lengthy observations of a disparaging character are made on the judgments of the Exchequer Chamber and House of Lords in *Cox and Others v. The Mayor, &c., of London*; and in the preface the author desires to "draw attention to the ancient rights and privileges of the City, that the silent encroachments of time and envy may be swept away, and the Court restored to its former state of usefulness."

This is a bad opening for a guide. We are not told what has done the mischief and affected the former usefulness of the Court. Surely the author knows that within some twenty years the Court was so close and exclusive as to be limited to four counsel and six attorneys. Although the most ancient in the kingdom, does he consider opening the Court to himself and the whole profession an injury to City privileges? Hardly this, perhaps, but from some remarks he really does object to the Act, obtained by the City in 1857 for regulating and extending their jurisdiction, on the extraordinary ground of "its having crippled the powers of the Court," and the "apparent ignorance of the full extent of the power of the Court," shown by the framers of the Mayor's Court Act, 1857, on which this little book professes to be written.

The whole of the Mayor's Court Act is given without omitting the sections in judgment summonses and commitments practically repealed by the Debtors Act 1869, and including the old forms of procedure now wholly useless, the new rules, issued December, 1869, being only inserted by an afterthought in part of the impression after binding.

The Debtors Act is thus quoted (p. 49), "Now by the 32 & 33 Vict. c. 62, *except in cases under 50l.*, no person shall be imprisoned for making default in payment of a sum of money, except, &c. (then partly following s. 4 of the Act)." But where does our author get his exception we have italicised? There is no such restriction in the Act, and the only reference to debts not exceeding 50l. is, as to the issue of debtors' summonses by the County Court.

On the procedure of the Court the author is equally careless. As an example, when referring in p. 12 to the Order in Council extending the Bills of Exchange Act to this Court, we are told that such order "very properly assumed that this being a Queen's Court, actions would be commenced by writ of summons in the Queen's name," &c. Also "that actions under the Bills of Exchange Act must be commenced by writ of summons." And, "that power was given by such Order in Council to make or alter writs, so that it appears *utterly monstrous* that actions are not commenced in a legitimate manner and consistently with the dignity of this high court by issue of the Queen's writ."

All this strong language because the Mayor's Court preserves the ancient practice of plaint, although when issued upon a bill of exchange the bill is copied at length, and full notice given defendant as required by the Bills of Exchange Act. This censure of the

practice is extraordinary in an author so anxious for the ancient rights and privileges of the Court, but reference to the Appendix containing the Order in Council itself shows how very little the author can be trusted. At the top of p. 6 of Appendix we read, "That all the provisions of the summary procedure on Bills of Exchange Act, 1855 (except, &c.) shall apply to this Court." And that the said several sections and schedules to the said last mentioned Act shall be read as if the word "*plaint*" had been used therein instead of the words "writ of summons" or "writ."

The author is indignant with the Court for not availing of s. 45 of the Act to make new rules, and comments on the "Recorder's task of making bricks without straw, the necessary result being that a great number of the orders made by the Court and Registrar are illegal and without warrant." And in a note pasted in to explain omission of the rules under the Debtors Act, we are told "that this Court has from time to time made rules of its own authority which materially alter the practice of the Court; no notice of them will be found in this work, because it is clear they are not of any force until sanctioned as required by the Act (s. 45)." These sweeping assertions are wholly unsupported by evidence, and not a single instance is given of even an alleged illegal order.

The observations on procedure occupy some dozen pages, and are substantially taken from the Registrar's work, and the useful tables of costs are copied verbatim from the same source.

The Corporation advisers doubtless intended that no objection to jurisdiction should be possible except by plea, and so far as the ordinary jurisdiction between the parties to an action is concerned, s. 15 may be considered conclusive on that point, but, with the carelessness so noticeable in the work before us, at p. 33 it is stated that "no plea to the jurisdiction is allowed in cases under 50*l*." This would be most deceptive and misleading, as by reference to s. 12, at p. 31, pleas to jurisdiction below 50*l*. are pleadable "where defendants do not dwell or carry on business in the City, or have not done so for six months before suit, or the cause of action did not in part arise therein."

The case of *Manning v. Farquharson* (30 L. J. Reports, Q.B., 22) certainly decided that *defendants* cannot obtain a prohibition on the ground of non-liability to the process of the Mayor's Court, but must in all cases personally appear and plead to the jurisdiction. The author, however, endeavours to make this case an argument against the law laid down by the House of Lords in Cox's case, where the *garnishee* in an attachment case was held entitled to prohibit the Mayor's Court on the ground that the bare fact of the *garnishee* having been personally found in the City gave the Court no power under the Custom of Foreign Attachment where the parties were not resident in the City, and no part of the cause of action arose therein. The *defendant* even in such a case as this would be obliged to plead, and before he can appear must give good bail to dissolve the attachment, but the position of a *garnishee* warned of an attachment when passing through Cheapside is clearly

very different. We agree with the author that the questions connected with Cox's case are very important, but do not see how they can be argued again, as unless the Legislature interferes, the decision of the House of Lords is quite final. "Foreign Attachment by the Custom of London" is too wide a subject for discussion here, but we think it may be worth the consideration of the City authorities, whether they should seek power to serve attachments anywhere in England similar to ordinary actions, upon proof that the cause of action in some part arose in the City. This would interfere very little with the usefulness of these attachments, and would probably enable the Mayor's Court to retain the same right as in ordinary cases, of trying the question of jurisdiction itself. The author's observations on the ancient powers of the Lord Mayor are interesting, and those on the vexed question of the inferiority of the Court pertinent enough from his view of the case.

A remark at p. 23 is quite new and somewhat startling. "The Court has *exclusive* jurisdiction in ejectment, formerly just the same as in the superior court, and now as described in the Common Law Procedure Act, 1852." Actions of ejectment are rarely, we believe, brought in this Court, and what the author means by "exclusive jurisdiction" we cannot imagine.

The Corporation have given notice of a Bill for the present Session to amend their Act affecting this Court, and we wish them every success. The present necessity for all affidavits to be sworn at the Court or before justices will doubtless be easily remedied, and power given to all commissioners of the superior courts in town and country.

As stated in a former article, we are not opposed to the foreign attachment of this Court reasonably carried out, and now that all creditors' remedies have been so much curtailed by the partial abolition of imprisonment for debt, we think this power might be conveniently extended, but so far as we can comprehend the "custom" on this subject, it has always been limited to cases within the Court's jurisdiction.

The author suggests making the Mayor's Court a portion of the superior courts. We cannot agree with him; the Mayor's Court is nearly the last of the municipal courts—practically the only one in the metropolis, as the Borough Court of Record is now seldom heard of, although still legally existent—and we would much prefer seeing the City of London Court (the City County Court, and a rival jurisdiction, in many respects, of the Mayor's Court) absorbed into the general County Court system, and thereby made completely a County Court, and the Mayor's Court left quite intact for the use of business men in the City. Should this be done, we are confident that in a very few years, the contrast of the practice of such a municipal court with all County Courts would materially assist in bringing about the reforms the latter tribunals so much need.

A Manual of the Usages of the Stock Exchange, and of the Law affecting the same, with Forms and Precedents of Pleadings. By Noel H. Paterson, B.A., Oxon., of the Middle Temple, Barrister-at-Law. London: H. Sweet. 1870.

"FENN on the Funds" has long and justly been regarded as the great English authority upon the subject of which it treats, and the little manual which is entitled above does not aim at superseding it, but, if it has any reference at all to it, aims rather at supplementing it. Thus, the former work, which is also very much the larger of the two, is principally, and, indeed, almost exclusively, *statistical*, consisting of a series or succession of tables, designed to show the origin, growth, and present state of the indebtedness of the different nations of the world; whereas the latter work, the manual, is entirely *legal*, and aims at being an epitome or brief statement of the principles of law applicable to the Stock Exchange, and it is to be judged of in that regard alone. But, inasmuch as the statistics of national indebtedness, and the rules of law affecting that indebtedness, are evidently kindred subjects, from the kindredness of their respective subject matters, it might reasonably be expected that this manual of Mr. Paterson's, if it should prove to be well executed, and to be tolerably complete, and also tolerably authoritative as an exposition of the law upon the subject, would become a companion volume to the work of Mr. Fenn, which, for its part, is all that can be desired.

We have very carefully perused the little work, and shall, by-and-bye, point out what we consider its faults; but, waiving those faults for the present, it must, in justice to the author, be admitted that his "Manual of the Law affecting the Stock Exchange" is possessed of a certain amount of intrinsic merit, or, at least, utility, as well for the student as for the practitioner of law. Thus it presents, in a compendious form, a tolerably continuous and complete exposition of the principles and cases applicable to its subject matter; and all that is wanting to render it a safe and trustworthy guide is a reference at large to the authorities referred to in the volume, such a reference being necessary, as well for the purpose of verifying the statement of the law given in the manual, as also, and chiefly, for the purpose of ascertaining the particular modifying circumstances of each particular case, the decisions of Courts of Equity proverbially turning upon seemingly trivial circumstances. This manual affords, moreover, a good general *résumé* of the law, within limits which are easily masterable, even by the unprofessional reader.

Although thus commendable in its plan and useful in its contents, the manual is very far from being either clear in respect of its logical structure, or complete and accurate in respect of its matter, or authoritative in respect of the mode of its execution—three faults of an undoubtedly serious character, which, unless they are greatly remedied in the next edition, seem likely to deprive it of the place

of honour which we should like to see it take, that, namely, of becoming a companion volume to the work of Mr. Fenn.

For, in the first place, it must unhappily be confessed that we experienced very considerable difficulty in discovering the logical method which underlies, as we believe, the three principal or concluding chapters of the work. Certainly the table of contents does not show this method, and therein it is most faulty, although therein also should have naturally lain its merit; nor again do any prefatory remarks at the beginning of the several chapters indicate the relation in which these chapters stand towards each other; and the inevitable multitude of details which are both usefully and well introduced into those chapters, only tends further to obscure the naturally unapparent plan of the work.

In the second place, the work is incomplete, not, indeed (so far at least as has occurred to us), in totally omitting any particular class of matters, but in neglecting to fully state and fully illustrate some few of the matters which it expressly handles. For example, the great case of *Pinkett v. Wright* (2 Ha. 120) is altogether omitted from this treatise, and is not even included in the list of cases referred to on p. 67 in illustration of the power of the directors of companies to refuse registration of shares. Moreover, the work is slightly inaccurate in one or two places; as, *e.g.*, in asserting broadly on p. 28 the absolute obligatoriness upon the general community of the customs or usages of the Stock Exchange. It is true indeed that, in the words of Lord Denman, in *Sutton v. Tatham*, every one who employs a broker must be taken to authorise him to act in accordance with the rules of the Stock Exchange; but then, when the last mentioned case, and the other cases quoted on this subject by Mr. Paterson are referred to at large, it is found that the authority in question is one entirely *relative*, and is not absolute in any sense, but is on the contrary confined to the relation which for the time, or on the occasion of any particular transaction, is established between the broker and the person employing him. For no usage of the Stock Exchange, nor indeed of any other body or society, is absolutely binding on the community, until recognised by the Common Law, or law of the community, as possessing such obligatory character.

And in the third and last place, this manual is extremely defective in a respect which it lay and lies with the author to remedy, we mean, in respect of its authoritative character. We admit that the narrow limits which the author has assigned himself in this manual necessitated in great measure the fault in question; but then an author is not the less to blame because he chooses to strait-lace his babies; and we do think that, considering the increasing cheapness of law publications, and the acknowledged want of such a work as this one of Mr. Paterson's might have been and yet might readily become, the author of it might profitably have extended and might yet extend the limits of his manual—say to twice or three times its present range—so as to set forth within this larger area the more leading cases with somewhat of detail, bringing such cases into *relief*, and arranging around them, in subordinate groups, the

less important kindred cases. But in truth as Mr. Paterson's work is at present constructed, the prominent fault of it is this, that it brings no one case into greater prominence than another, with the doubtful exceptions of *Grissnell v. Bristowe* and *Coles v. Bristowe*, but presents a large assortment of miscellaneous cases, huddled together after the manner of a Turner's landscape, which although it may be suitable in a sketch imitating the disorders of nature, is most unsuitable in a didactic treatise professing to methodize the disorders of the law. It is true that this fault of Mr. Paterson's manual is not peculiar to him, but is common to the majority of writers upon law; yet there cannot be imagined a more pernicious fault, and where it occurs in the works of juvenile authors, its effect is to deprive those works of the larger part of the merit which is often unquestionably due to the painstaking labours of their authors; whereas if juvenile writers would but contrive to make themselves the mere mouthpieces of the legislator and the judge, mere *oratores facundi*, they would infallibly acquire for their treatises an authority which their persons did not possess. We suspect the present author for a juvenile; yet we have been so much pleased with numerous features in his work, and we are also so much desirous of seeing a good and convenient manual upon the subject, that we have been at considerable pains to point out the faults of Mr. Paterson's work, at the same time that we allow its merits, in the hope that Mr. Paterson may be induced, by the kindly and suggestive criticism of this *Review*, to enlarge his manual in the next edition of it to a size larger, and to execute it in a manner which will entitle it to take its place side by side with the work of Mr. Fenn. That were a good alliance, and a noble spouse to win.

The Life Assurance Companies Act, 1870, with a Commentary on the Life Insurance Legislation of that Year: forming a Supplement to the "Law of Life Assurance." By C. J. Bunyon, M.A., Barrister-at-Law. London: Charles & Edwin Layton, Fleet Street. 1870.

THE passing of the Life Assurance Companies Act, and the recent decisions with respect to what is called Novation of Contract have rendered it necessary to the completeness of Mr. Bunyon's standard work on Life Assurance Law that he should supplement it by the present publication. Both these subjects have been considered at length in the *Law Magazine* (Vol. XXIX., p. 193, and Vol. XXX., p. 96), and it is not necessary, therefore, to enlarge upon them in the present notice. It is sufficient to say that our views receive confirmation from the independent thought of so competent an authority as Mr. Bunyon is.

He criticises with some severity the draughting of the Act, which he describes as "an actuary's Bill rather than a lawyer's," though he complains of it as not defining what an "actuary" is. He suggests that the opportunity should have been taken to require from the

persons desiring to perform the functions of actuaries under the Statute some certificate of competency, such as the "Institute of Actuaries," which (he says) "comprises the majority of the profession," could grant. In this we hardly go with him; first, because the minority not comprised in that body is one very worthy of respect; second, because the number of persons who act as "professional" actuaries must always be extremely limited. Every important company must continue to have, as hitherto, its own actuary within its walls, who, as he cannot be constantly employed in purely actuarial work, is also the secretary, or agent, or accountant of the company, and cannot, therefore, be a strictly "professional" actuary. We think the Act makes sufficient invasion on the abstract right of a company to manage its own affairs, without requiring that the officer they select to perform a particular function should have the certificate of a merely voluntary association as to his ability to do it.

Mr. Bunyon thinks, and we concur with him, that the sections of the Act which enforce compliance by penalties will probably be efficient, and that not so much by the money value of the penalties, as by the exposure which the Board of Trade is authorised to make of any Company disobeying the Act. Their stringency has been greatly increased since the measure was first introduced into Parliament by Mr. Stephen Cave in 1869, and we then thought it would be "as effective as mere legislation can be." It is quite possible, however (though we hope, under the circumstances, hardly probable), that the only effect of the Act may be to fill the pigeon-holes of the Joint Stock Registry, as they have been filled before, with documents from which no one, however deeply it may concern him, will care to extract the truth.

A notice of s. 10 of the Married Women's Property Act of last Session also comes within the scope of Mr. Bunyon's pamphlet, and he comments upon it with unqualified approval, and not without some quite justifiable self-satisfaction in having to some extent forestalled it by the issue of "Settlement Policies" from the company with which he is connected. We have already heartily endorsed his views (*Law Mag.* XXIX. 205-207), and we share his satisfaction in their realisation.

Report of the Case of *The Queen v. Nicholson*, for removing Shingle from the Foreshore at Witherusca. London: Butterworths. 1870.

THIS is a little publication of considerable interest with reference to seashore rights. It appears that in many parts of England the sea is making great encroachments in consequence of the removal of shingle—the natural protection of the coast—the result of which is that the sea makes breaches or gaps, and covers by degrees large tracts of land. Thus, in 1850, a report was made to the Admiralty of a breach made by the sea at the entrance of the Humber; and on the Holderness coast the actual waste has been computed at the rate

of several yards a year. At Hornsea. 1000 tons of beach shingle had been taken away in a week ; and it appears that the roads are commonly made with it in those parts of the country. The consequences threatened to be so serious that the Board of Trade resolved to put a stop to the practice, by asserting the rights of the Crown to the foreshore, and hence an information was laid before the magistrate at Hull which resulted in a conviction. Mr. Kemplay appeared for the defendant and suggested a case for the Court of King's Bench, which was agreed to, and the case in due course will be stated and argued. In the meantime this is a correct and authentic report of the hearing before the magistrate, with the information and depositions, and the documentary evidence, including the enactments and the order of the Board of Trade on the subject ; in short, all the materials of the case, with the judgment of the magistrate, all within the compass of fifty pages. It is a complete statement of the law and facts of the subject, and is of great interest to all who are in any way interested in the rights of the seashore.

A Treatise upon the Law applicable to Negligence. By THOMAS WILLIAM SAUNDERS, Esq., of the Middle Temple, Barrister-at-Law, Recorder of Bath. London : Butterworths. Dublin : Hodges, Foster & Co. 1871.

ALTHOUGH we by no means admit the accuracy of the author's statement, namely, that the law relating to the subject of negligence is in a somewhat obscure state, nevertheless, a moment's consideration will show that the statement has something of truth in it. The real difficulty lies in the fact, that the law applicable to cases arising from negligence is difficult to apply by reason of the infinite diversity of circumstances out of which legal responsibilities flow, and the varying and diverse views of particular circumstances that must necessarily be held by different people ; hence it is impossible that the law can be administered with absolute certainty or uniformity, where there is such ample room for divergence in judicial opinion. Take that class of case for instance to which public attention has recently been called, in which passengers upon a railway have been injured whilst alighting at stations, (*Siner v. Great Western*, 37 L.J. Ex., 98 ; *Foy v. London, Brighton, and South Coast Railway Company*, 18 C.B., N.S., 225 ; *Bridges v. North London Railway Company*, L.R. ; 5 C.P., 439 N. ; *Cockle v. London and South Eastern Railway Company*, L.R. ; 5 C.B., 437) ; it is no doubt "to be regretted that the law upon so important and constantly recurring a question" should be in an unsettled condition, but it is impossible for it to be otherwise, whilst men continue to possess separate judgments, and attach different values to facts.

Our view is, that the law is rather difficult to apply, than that it is itself obscure ; and we think Mr. Saunders has earned the thanks of the profession by the way in which he has dealt with

the subject. The book is admirable; while small in bulk, it contains everything that is necessary, and its arrangement is such that one can readily refer to it. A knowledge of the law may be, perhaps, in the widest sense unattainable, but a knowledge of the places where the law may be found is in these days attainable very readily, so many have entered upon the wide field of legal authorship, and mapped and planned it out for others, and amongst those who have done good service, Mr. Saunders will find a place.

A Treatise on the Law and Practice relating to Vendors' and Purchaser of Real Estate. By J. Henry Dart, of Lincoln's Inn, Esq., Barrister-at-Law. The Fourth Edition by the Author and William Barber, of Lincoln's Inn, Esq., Barrister-at-Law. London: Stevens & Sons.

THE single volume of which this work formerly consisted has been made to expand and divide itself into two volumes, each of them larger than the original single volume; and the simple dedication of friendship has had to give place to the ostentatious dedication of ambition, the name of Mr. Christie having been replaced with that of the Lord High Chancellor of Great Britain. The third edition having appeared in the year 1856, a period of fourteen years separates that edition from the present one, which may be roughly described as a reproduction of the third, incorporating all the enactments and decisions which have been passed and entered up within the interval. Now it is both useful and satisfactory to obtain from the accurate and experienced mind of Mr. Dart a harmonised statement of the old and new law; and we therefore not a little regret that from whatever cause the important Statutes of the year 1870 regarding the property of married women, apportionment, naturalisation, stamps, and the abandonment of railways, should have received only the most cursory notice in the list of the addenda. But this unhappy feature or defect in the work was doubtless not within the power either of the author or of his co-editor to avoid.

The general plan of the original work is preserved. There are, however, two chapters interjected upon subjects which are entirely new, namely, "Registration of Title," and "Powers of the Court of Chancery to sell under Recent Statutes." The author proceeds at once to the great subject-matters of his treatise, which are the various duties mutually incumbent upon vendors and purchasers of real estate, and the various modes in which those duties respectively are incurred, are modified, are perfected, and are ultimately discharged or else receded from. And in the execution of that his purpose, he discusses the particulars and conditions of the intended sale, the sale itself, and its accompanying agreement, or (as it is thenceforth called) contract of sale upon the rights of the parties to it, the abstract which in due course follows upon the contract, the production and examination of deeds for the purpose of verifying the abstract, the customary requisitions regarding title, the search for incumbrances,

the preparation of the conveyance, and the completion of the purchase. At this stage it might have been supposed that the author's task was ended, and certainly the *positive* part of his work is here complete; but the treatise is extended further, for the purpose of discussing which may be called the *negative* or remedial portion of it, the mutual rights which arise to vendors and purchasers of real estate upon the happening of anything untoward after the completion of the purchase, together with the various remedies provided and made available for the purpose of establishing those rights.

We have been strongly tempted to present the reader with a summary or analysis of the chapter in which the author treats of the Specific Performance of the Contract of Sale; but space forbids us to do more than mention that in that one chapter the author conducts us with the most painstaking clearness through all the stages of the suit (from the beginning to the end of it) which it is necessary to institute in order to make this remedy available, and the merest novice in the profession could not fail of conducting the suit to a successful issue if he but scrupulously followed this statement of Mr. Dart.

In conclusion, we have to add that the treatise is furnished with a very full and valuable table of contents, with a list of the cases cited and of the Statutes referred to in the work, and with an index which itself extends to the large number of 180 pages. We have moreover examined the index somewhat critically, and we have also compared it with the index to the third edition; and as the result of such an examination and comparison, we have not only found the references correct, but have also detected more particularly under the words Abstract, Argument, Conditions of Sale, Contract, Conveyance, Covenants, Incumbrances, Mortgage, Mortgagee and Mortgagor, Notice, Purchase Money, and Specific Performance, a large number of insertions which were not included in any of the indexes to the previous editions. The work is therefore a most excellent one in every way and at every part of it; and but for the apparent inclination of the author or his co-editor, or of both, to sacrifice the body to the head of the profession, our praise of it should have been unqualified and entire.

A Treatise on the Validity of Verbal Agreements, as affected by the Legislative Enactments in England, and the United States, commonly called the Statute of Frauds. By Montgomery H. Throop. London: Steuvers & Haynes. 1870.

THIS is the first of two volumes of a work which promises to be the most valuable explanation we have yet possessed of the Statute of Frauds. Mr. Throop is an American, and the work is primarily intended for the use of members of the American Bar, but the law, in most of the States of the Union, is either borrowed directly from the English Statute, or without alteration, or is borrowed in part, or is in some cases borrowed with slight alterations. The first volume

begins with setting out at length the text of the original Statute. Then follow naturally Lord Tenterden's Act (9 Geo. IV. c. 14), and those sections of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), which provide that in the cases within the Statute of Frauds no special promise shall be held invalid to support an action, suit, or other proceeding, by reason only that the consideration does not appear in writing, or by necessary inference from written document. The several American Statutes come next. We have, then, a general survey of the Statute, containing its history and general purpose. Part first treats of special promises of executors and administrators to answer damages out of their own estates. Part second of special promises to answer for the debts, defaults, and miscarriages of another person. This brings us to page 670. Part third is of agreements made upon consideration of marriage. This, with a very copious index, concludes Vol. I., which contains 800 pages. When we have the second volume before us we shall be better able to judge of the work as a whole, and shall so speak of it. At present it is sufficient to say that the work displays great industry, is a credit to American typography, and, so far as we can judge from the volume before us, is written by one who is not a mere compiler of cases, but who has something of the spirit of Kent and other American jurists. If the second volume bears out the promise of the first it will form by far the most comprehensive work which we yet possess on a subject of prime importance to lawyers. It is only right to mention that, though an American work, there can scarcely be an English case which is not brought in by way of illustration, and that the American cases themselves will often be as much to the point as those backed by judicial authority in this country. The edition before us is published in England by Messrs. Stevens & Haynes.

The Married Women's Property Act, 1870: Its relations to the Doctrine of Separate Use; with Notes. By J. R. Griffith, B.A., Oxon., of Lincoln's Inn, Barrister-at-Law. London: Stevens & Haynes. 1870.

THE object of this little work, as stated in the preface, is to give a summary of the cases decided in Courts of Equity on the rights and liabilities of married women in relation to their separate estate, and to suggest some changes, which may probably arise in the practice of the courts from the new status given to them by the Act. The introduction consists of a review of the principal decisions in Equity during the last thirty years upon the rights and liabilities of married women. We think the statement that "in courts of law a married woman had, until the passing of the Act of the last Session, no recognised status, her position was one of disability and immunity" open to exception as somewhat too sweeping. Of course it is correct, provided it be understood with proper reservations; and, addressed as it is to lawyers, is not likely to mislead. What is meant is that a married woman had not any independent position, as a party in an

action at law. The proposition taken without any qualification, might seem to imply that a married woman could not take proceedings in the Divorce Court or in a police court. Of course it is only to the form of expression used by Mr. Griffith to which we take exception; and in any case it is not so absurd, as the statement made a short time ago by a legal journal, that a married woman has no legal existence. Mr. Griffith's comments on the probable operation of the Act are, of course, of a purely conjectural character, as no decision of any moment has, so far as we are aware, been pronounced. With regard to the 12th section, which apparently gives a husband power, by marrying a lady of property without a settlement, to defraud his wife's ante-nuptial creditors, Mr. Griffith is of opinion that a Court of Equity would not tolerate any such proceeding. Mr. Griffith cites a dictum of Vice-Chancellor Stuart in *Columbine v. Penhall*, 1 Sm. & Giff., 228, 256, that "where there is evidence of an intent to defeat and delay creditors, and to make the celebration of marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support such a settlement;" and the case of *Bulmer v. Hunter*, L.R., 8 Eq., 46, where a man married a woman with whom he had been cohabiting, and settled property upon her, and thereby defrauded an ante-nuptial creditor. Vice-Chancellor Malins set aside the settlement as against the creditor. Mr. Griffith's arguments might very fairly be employed by counsel in argument, but, as Mr. Griffith is fully aware, they do not cover the whole of the proposition for which he contends. And it might fairly be urged on the other side, that for a Court of Equity to do what Mr. Griffith supposes it to do would be to alter the express words of an Act of Parliament. It may be said that this would not be a greater stretch of authority than the manner in which Courts of Equity have dealt with certain sections of the Statute of Frauds. But at the present day Courts of Equity would be more reluctant to over-ride the words of a Statute than at the time when the Statute of Frauds was passed.

We may observe, in conclusion, that though Mr. Griffith's work contains much with which legal readers will be perfectly familiar, it is a well-digested summary of the decisions bearing upon the subjects treated of in the Act, and is well worth perusal.

An Elementary View of the Proceedings in a Suit in Equity, with an Appendix of Forms. By Sylvester Joseph Hunter, B.A., of Lincoln's-Inn, Barrister-at-Law. Fifth Edition, by George Woodford Lawrence, M.A., of Lincoln's-Inn, Barrister-at-Law. London: Butterworths, 7, Fleet Street. 1871.

EDITION rapidly follows edition of this little work. As an excellent introduction to the study of Chancery practice the book has established its position, and we think the editor has done wisely in merely introducing such amendments as the alteration in the law by Statutes and Orders requires, and abstaining from any attempt to make it a manual of practice.

The Law of Naturalization as amended by the Naturalization Acts, 1870. By John Cutler, B.A., Barrister-at-Law, Professor of Jurisprudence at King's College, London. London: Butterworths. 1871.

PROFESSOR CUTLER has published a useful little book on the "Law of Naturalization." He commences with a treatise on the law as it was, and then gives the Act of last year to show the law as it is. In this he considers, (1.) Who were aliens before the Statutes of last Session? (2.) Who were British subjects? (3.) How a British subject could become an alien; and (4.) How an alien could become a British subject. On the subject of the maxim *nemo potest exuere patriam*, Mr. Forsyth, in his "Cases and Opinions on Constitutional Law," gives a long opinion from Mr. Reeves, the author of the well-known legal history, which curiously illustrates the inflexibility of the old law of naturalization. In this Mr. Reeves maintains, *apropos*, we believe, of the case of *Doe v. Acklam*, that every citizen of the United States whose ancestor was under English-allegiance remained still (*circa* 1818) under the allegiance of his sovereign lord, King George III., and that the recognition of American independence had not altered his position in the least. On one point connected with the law of allegiance we should be glad to receive information from any of our readers or from Professor Cutler. Would a Hanoverian born previous to the accession of our present Queen have been an alien? On the application of every principle deducible from Calvin's case he ought not to be so considered. The case must have occurred. Mr. Chisholm Anstey, whose singularly great knowledge of constitutional law is known to many, told the present writer that he believed that the case had come before the law officers of the Crown about 1840, and an opinion had been given in accordance with the decision in the case of the *Postnati*, but we have not been able to find any statement of the fact. Professor Cutler's book is a useful summary of the law, and of the changes which have been made in it. The Act is given in full, together with a useful index.

The American Law Review, October, 1870. Boston: Little, Brown, & Co.

THIS number contains, in addition to a lengthy summary of events, book reviews, and a selected digest of state reports, the following articles—(1.) "Codes and the Arrangement of the Law." (2.) "The Trials of Toppman and Prince Bonaparte"—a very interesting article. (3.) "Degrees of Negligence." (4.) "Suits between Firms with a Common Member." Altogether the contents form an excellent part.

The Practice of the Court of Probate in Common Form Business.

By Henry C. Coote, F.S.A., Proctor in Doctors' Commons ; also a Treatise on the Practice of the Court in Contentious Business.

By Thomas H. Tristram, D.C.L., Advocate. Sixth Edition. London : Butterworths. 1871.

WE regret that, owing to some mishap, the reviewer of this book had not sent in his copy on going to press. A notice will appear in our next number.

The Albany Law Journal. Albany, New York : Weed, Parsons, & Co.

THIS nicely got-up weekly periodical continues to interest the profession with a series of amusing and well-selected reminiscences of the legal world, both at home and abroad. As a collection of anecdotes concerning law and lawyers, no publication hitherto has approached it in the great variety, and in many cases, originality, of its contents. Of late the journal has become, as was intimated that it would, less factious than formerly, but not the less pleasing on that account, as the pages devoted to legal literature are sprightly and ably written. The Digest of Decisions and Reports of Cases are not the least important part of the contents of this journal.

The Scottish Journal of Jurisprudence and Law Magazine. Edinburgh : T. & T. Clark.

THE numbers for the quarter contain among the usual notes of cases, &c., a translation of the title of the *pandects ad legem aquilianam* ; some remarks on that portion of the Report of the Scotch Law Courts Commission by the dissentient members of that body, chiefly concerning the Inner and Outer House ; the Annual Addresses at the opening of the session of the Juridical Society and of the Scottish Law Amendment Society ; and some well-timed observations on the administration of justice in Scotland as compared with some other systems.

PUBLICATIONS RECEIVED.

The Law Times.

The Irish Law Times.

The Law Journal.

The Canada Law Journal.

The Australian Jurist.

The United States Jurist.

Events of the Quarter, &c.

RULES UNDER THE JURIES ACT.

THE following rules of Court, made by the Judges of the Superior Courts in pursuance of the Juries Act, 1870, are applicable to trials in London and Middlesex :—

(1.) That a juror summoned to attend for the trial of common or special jury causes in London or Middlesex, not having had notice on a previous day not to attend, who appears in obedience to his summons and continues ready to serve during the day if required, shall be considered as having been within the meaning of "The Juries Act, 1870," in attendance, and as being entitled to be paid according to the provisions of the Statute.

(2.) That the sum of 3*l.* shall be deposited with the associate upon the entry of every common jury cause in London or Middlesex by the party entering the same.

(3.) That upon the entry of every special jury cause in London or Middlesex, except as hereinafter mentioned, the sum of 12*l.* 12*s.* shall be deposited with the associate by the party so entering the cause.

Provided that where, *before* the entry of such cause for trial by any party, it has been made a special jury cause by the opposite party, then the party entering the cause may, if he think fit, give notice to such opposite party of his intention to deposit with the associate the sum of 3*l.* only, and to enter the cause for trial by a common jury, and may thereupon enter the cause to be tried as a common jury cause and deposit with the associate the sum of 3*l.* only; and in that case, unless the opposite party deposit with the associate the further sum of 9*l.* 12*s.* within one day after such entry, the cause shall be tried by a common jury as a common jury cause, unless a judge otherwise order.

Provided also that where a party to a cause has obtained an order that a special jury be struck for the trial of a particular cause, he shall on or before giving notice to the sheriff of such order deposit with the sheriff the sum of 25*l.* 4*s.*, otherwise the said order shall be of no avail, and the said cause shall be tried in the same way as if no such order had been made. The sheriff shall forthwith pay over to the associate the money so deposited with him.

(4.) Where a cause, *after* having been entered in London or Middlesex as a common jury cause, has been ordered to be made a special jury cause by rule or order, the sum of 9*l.* 12*s.*, being the difference between the deposit of 3*l.* made at the time of entry and the sum of 12*l.* 12*s.*, shall be forthwith deposited with the associate

by the party obtaining such rule or order ; and in default the cause shall, notwithstanding such rule or order, be tried by a common jury, unless a judge otherwise order.

(5.) That no second deposit shall be made on the re-entering of a cause for trial which has been withdrawn before commencement of trial.

(6.) That the deposits so made in London and Middlesex respectively in special jury causes shall form a fund for the payment of special jurors in attendance as aforesaid.

(7.) That the deposits so made in London and Middlesex respectively in common jury causes shall form a fund for the payment of common jurors in attendance as aforesaid.

(8.) That the funds aforesaid for London and Middlesex shall be kept separate and distinct for all purposes, and shall be applicable solely to the remuneration of jurors in London and Middlesex respectively.

(9.) That in every case in London or Middlesex in which the sum of 3*l.* only has been paid on the entry of a cause, whether entered as a special jury cause or not, if the cause is afterwards tried as a special jury cause, the sum of 3*l.* paid on entry shall form part of the special jury fund. And that in every such case in which the cause is afterwards tried as a common jury cause, the sum of 3*l.* paid on entry shall form part of the common jury fund.

(10.) That in all causes, whether tried by a special jury or by a common jury, the sum of 3*l.*, if deposited by the successful party, shall be recoverable as costs in the cause, if he be otherwise entitled to such costs.

(11.) In special jury causes, the further sum of 9*l.* 12*s.*, if deposited by the successful party, shall be deemed to be costs of the special jury, and shall be recoverable as costs in the cause if he be otherwise entitled to such costs, and the judge certify that the cause was fit to be tried by a special jury.

(12.) In all causes already entered and now standing for trial by special juries, the party who has made the cause a special jury cause shall forthwith, and before trial, deposit the sum of 12*l.* 12*s.* with the associate, and if he make default the other party may pay the same sum ; but if the party who has made the cause a special jury cause fails to pay the said sum of 12*l.* 12*s.*, the other party may pay the sum of 3*l.*, and thereupon the cause shall be tried as a common jury cause ; and if the sum of 3*l.* be not paid to the associate by either party, the cause shall be struck out unless the judge otherwise order.

The following *Regule Generales* are applicable to trials in other counties and places than London and Middlesex :—

(1.) That on every day during the assizes on which any civil cause is to be tried, the judge presiding in the civil Court shall direct that a sufficient number of jurors be taken by ballot from the common jury panel, who shall be the jurors during that day to try civil causes, and shall not during that day be called on to try criminal cases unless needed and required to do so by the judge presiding in the criminal Court.

The residue of the panel shall be the jurors to try criminal cases during that day, and shall not be called on to try civil causes unless needed and required to do so by the judge presiding in the civil Court.

The jurors thus taken by ballot, and who continue in attendance during the day, and such others as actually sit on the trial of any civil cause or causes, shall be considered as the jurors in attendance for that day, and entitled as such to the payment of 10*s.*: Provided that the names of those jurors who have already been taken by ballot for one day shall not, except by order of the judge, be included in the ballot for any other day during the assizes until all other names have been drawn.

(2.) That the sum of 3*l.* shall be deposited with the associate upon the entry of every common jury cause for trial at the assizes by the party entering the same.

(3.) That in every cause wherein notice is given to the sheriff by either of the parties to the cause, that such cause is to be tried by a special jury, the party giving such notice shall before or at the time of giving such notice deposit with the sheriff the sum of 12*l.* 12*s.* towards the fund for the remuneration of the special jurors; and in default of such deposit such notice shall be of no effect. The sheriff shall forthwith pay over to the associate the money so deposited with him.

(4.) The sum of 12*l.* 12*s.* shall be deposited with the associate upon the entry of every special jury cause for trial at the assizes by the party entering the same, unless he has previously made such deposit of 12*l.* 12*s.* with the sheriff as before-mentioned.

Provided that where, *before* the entry of such cause for trial by any party, it has been made a special jury cause by the opposite party, then the party entering the cause may, if he think fit, give notice to such opposite party of his intention to deposit with the associate the sum of 3*l.* only, and to enter the cause for trial by a common jury, and may thereupon enter the cause to be tried as a common jury cause, and deposit with the associate the sum of 3*l.* only; and in that case, unless the opposite party deposit with the associate the further sum of 9*l.* 12*s.* within one day after such entry, the cause shall be tried by a common jury as a common jury cause, unless a judge otherwise order.

Provided also that where a party to a cause has obtained an order that a special jury be struck for the trial of a particular cause, he shall, on or before giving notice to the sheriff of such order, deposit with the sheriff the sum of 25*l.* 4*s.*, otherwise the said order shall be of no avail, and the said cause shall be tried in the same way as if no such order had been made. The sheriff shall forthwith pay over to the associate the money so deposited with him.

(5.) Where a cause *after* having been entered as a common jury cause has been ordered to be made a special jury cause by rule or order, the sum of 9*l.* 12*s.*, being the difference between the deposit of 3*l.* made at the time of entry and the sum of 12*l.* 12*s.*, shall be forthwith deposited with the associate by the party obtaining such rule or

order; and in default the cause shall, notwithstanding such rule or order, be tried by a common jury, unless a judge otherwise order.

(6.) That in all causes, whether tried by a special jury or by a common jury, the sum of 3*l.*, if deposited by the successful party, shall be recoverable as costs in the cause if he be otherwise entitled to such costs.

(7.) In special jury causes the further sum of 9*l.* 12*s.*, if deposited by the successful party, shall be deemed to be costs of the special jury, and shall be recoverable as costs in the cause if he be otherwise entitled to such costs, and the judge certify that the cause was fit to be tried by a special jury.

(8.) It is further ordered that in all causes pending, and which are already entered for trial at the ensuing assizes, the plaintiff in any common jury cause shall, before the cause is tried, deposit the sum of 3*l.* with the associate for the purpose of the fund to be provided under the Statute for the remuneration of the said jurors to try common jury causes; and in case the plaintiff shall make default in paying such deposit the other party in the cause may pay the same, and in default of the same being paid the cause shall be struck out unless the presiding judge shall otherwise order.

(9.) In all causes pending, and which are already entered for trial by special juries at the ensuing assizes, the party who has made the cause a special jury cause shall forthwith and before trial deposit the sum of 12*l.* 12*s.* with the associate, and if he make default the other may pay the same, but if the party who has made the cause a special jury cause fail to pay the said sum of 12*l.* 12*s.* the other party may pay the sum of 3*l.*, and thereupon the cause shall be tried as a common jury cause, and if the sum of 3*l.* be not paid to the associate by either party, the cause shall be struck out unless the judge otherwise order.

PROPOSED ECCLESIASTICAL LEGISLATION.

THE following letter has been addressed to the Bishop of London by his Grace the Archbishop of Canterbury:—

“San Remo, Italy, Dec. 27, 1870.

“MY DEAR BISHOP OF LONDON,—As the time is approaching when such ecclesiastical measures as are to be submitted to Parliament next Session must be matured, I think it well that the clergy and laity should have an opportunity of quietly considering them in the interval which has still to elapse before the meeting of Parliament, and of the Convocation of Canterbury.

“I am in communication with the Archbishop of York, and hope that the two Provinces may be able to act in concert with reference to such measures as are desirable, and I now take the constitutional step of publicly addressing you as Dean of the Southern Province, in order that the attention of our own clergy and laity may be directed to what we deem desirable.

“It cannot be denied that many important matters of ecclesiastical reform, which have been long talked of, have hitherto been

unaccountably thwarted in their passage through the Legislature. The good hopes, for example, which were entertained by all of us for last Session came to nothing, and, with the exception of the Bishops' Retirement Act, the only considerable improvement in an ecclesiastical system, which has been effected of late years, is the revival of the ancient office of Bishop Suffragan, and this was accomplished by the resolution of Her Majesty's Government, at the request of the heads of the Church, and at the suggestion of the Convocation of Canterbury, to revive an already existing Statute which could be acted on without fresh legislation. Last Session the proposal to sanction a new Table of Lessons in the Prayer-book, to improve the law of ecclesiastical dilapidations, to reform the ecclesiastical courts, and other important measures of reform, though it was known that they were generally acceptable, both to clergy and laity, and most of them had received the distinct sanction of the clergy in their constitutional corporate capacity, all failed to command such attention as was necessary to insure their passage through Parliament.

"My belief is that these failures are, in part at least, attributed to the fact that sufficient publicity was not given to the measures intended to be proposed, and thus they had not received through general discussion that distinct sanction of public opinion which seems necessary in England for all important changes. It is with the view of obviating, if possible, this difficulty in the coming year that I now thus formally address your lordship.

"(1.) I take it for granted that Her Majesty's Government cannot allow the proposed change in the Table of Lessons, as embodied in the Lectionary Bill of last Session, to fall to the ground. Important branches of industry have been disturbed by the failure of that Bill, and great confusion, both in the University printers' and Queen's printers' offices, has followed. Yet it seems probable that the same opposition which caused the withdrawal of the Bill last Session will again prove fatal to it unless its scope be enlarged. The Bill professed to embody a recommendation of the Ritual Commission, and many felt that other most important recommendations of that Commission, on which there was little or no diversity of opinion in the Church, ought to have been embodied in it, and that otherwise the original promoters of the movement which led to the appointment of the commission might be thought to have been treated deceitfully. It is true that the most vexed questions, affecting the vestments of the clergy and certain recently introduced extravagances of the Ritual will, in all probability, be settled by the courts of law before Parliament meets, and it seems to have been thought wise by the Ritual Commission to await these decisions of the courts, before calling for legislation on such points. But there remain a great many important improvements, respecting which there is scarcely any difference of opinion in the Church, which have been recommended by that Commission. I may instance an improvement respecting the use of the Burial Service, a power of abridging the daily Church Service with the consent of the diocesan, a distinct

recognition of the propriety at times of dividing the several parts of the Sunday service, and some amendment of the rubric regulating the use of the Athanasian Creed, as matters on which there seems to be an almost universal consent in the Church.

"(2.) Connected with the same subject as the proposal of the Ritual Commission to give the communicant laity of each parish some voice in the ordering of the mode of conducting the Church services, not intended to be everywhere entirely alike, was Lord Sandon's measure upon the appointment of parochial councils. There was also a clause of a similar nature in Lord Shaftesbury's Ecclesiastical Courts Bill. From all these several proposals some measures may well be devised which shall give the laity of each parish their legitimate influence, and yet not interfere unnecessarily with the discretion of the parish clergy.

"There remain—

"(3.) The Archbishop of York's Ecclesiastical Dilapidations Bill.

"(4.) The Bishop of Winchester's Bill for allowing disabled clergymen to retire from their cures.

"(5.) The Bill advocated by the Duke of Marlborough in the House of Lords to restrain the sale of next presentations to livings.

"(6.) The proposal to reform the Ecclesiastical Courts, which Lord Shaftesbury has for two Sessions brought before the attention of the House of Lords.

"The proposals to remove the abuses attendant upon the sequestration of benefices which occupied the attention of a Select Committee of the House of Lords last Session.

"I do not think that we shall have done our duty to the Church and nation till all these questions have been finally settled. I hope that such of them as have not yet been formally approved by our convocations may speedily be discussed in these bodies, and that both clergy and laity will lose as little time as possible in making their opinions known to the Legislature. It seems to me to be the duty of the heads of the Church to consult at once with Her Majesty's Government as to the best means to be taken for giving effect to the wishes of Churchmen on these important reforms. Some of the measures may with great propriety be introduced in the first instance in the House of Commons, either by the Government or by some of those private members who so well represent our feelings in that House, and have secured to themselves the attention of Parliament. Meanwhile, it seems to me also desirable that when the proper time comes joint committees of the two convocations of Canterbury and York should be appointed to discuss and communicate with the Government on such of these proposals as have not yet been fully considered by the clergy of both provinces.—Believe me to be, my dear Bishop of London, yours very sincerely,

"(Signed)

"A. C. CANTUAR.

"The Right Rev. and Right Hon. the
Lord Bishop of London."

LAW UNIVERSITY.

THE following are the proposals of the Legal Education Association for a University, or School of Law :—

(1.) To place the general course of studies and the examinations preliminary to and requisite for admission to the practice of the law, in all its branches, under the management and responsibility of a Legal University, to be incorporated in London.

(2.) To make the passing of suitable examinations in this University (or of equivalent examinations in the legal faculty of some other university of the United Kingdom) indispensable to the admission of students to the practice of the Bar, or to practise as special pleaders, certificated conveyancers, attorneys or solicitors ; such examinations, and the courses of study preparatory thereto, being either combined or divided as may be desirable and convenient with a view to the knowledge of the general principles of law, or to the acquisition of the special attainments necessary for particular branches of the practice of the legal profession.

(3.) To offer the benefits of the course of study and examinations to be afforded by the University to all classes of students who may desire to take advantage of them, whether intending or not intending to follow the legal profession, in any of its branches, and whether members or not of any of the Inns of Court.

(4.) To enable the University to confer (among other honours) such degrees in law as are conferred by other universities.

(1.) The fundamental principle of this proposal is to distinguish between legal education and the practice of the legal profession, making the former necessary as a condition precedent to the latter.

(2.) In accordance with this principle, the Association does not propose to ask on behalf of the University for any power to confer the status or degree of barrister-at-law, or to admit students to the right of practising either at the Bar, or as conveyancers or special pleaders below the Bar. It proposes to leave the regulation of the right of practising at and below the Bar, the other conditions (*i.e.*, other than legal study and examinations) of admission to practise, and the exercise of discipline (including the power of exclusion from practice) over all such practitioners, to the authorities to whom it is now, or to whom it may from time to time be, by law committed.

(3.) In like manner, the Association does not propose to interfere in any manner with the admission of attorneys and solicitors to practise in any of the courts of the realm, or with the disciplinary or other powers of those courts over attorneys or solicitors, as their own respective officers.

(4.) The Association is desirous of constituting the University under the government of a Chancellor, Vice-Chancellor, and Senate, with the Crown as visitor ; according to the analogy of the other universities of the realm.

(5.) In the constitution of the Senate they would desire to see those bodies which now represent the organised power and opinion

of the different branches of the legal profession (*i.e.*, the Inns of Court, and the Incorporated Law Societies, Metropolitan and Provincial) suitably represented; and it would, in their judgment, be desirable that a connection should also be established between this University and the Universities of Oxford, Cambridge, and London (all of which have their legal faculties, increasing daily in importance), by the presence upon the senate of some members nominated by those Universities. But, as to all details of this nature, it is felt to be necessary, before arriving at any final scheme, to ascertain how far the desired co-operation may be expected from all or any of the learned bodies above-mentioned, and under what conditions (if at all) it may be obtained.

(6.) In the event of the University being established as proposed, the functions of the now existing Council of Legal Education would necessarily cease; and the fees payable by students under the regulations of the University, together with such contributions as might be made by the societies associated in its government (which, from the liberality of those bodies, would doubtless not be less than their present contributions to a similar object), would form the Academic Fund, out of which the stipends of the professors and readers, and all other necessary expenses of the University would be defrayed.

(7.) It is proposed that the University should be created by royal charter, after the passing of an Act enabling the Crown to provide by charter for objects which might not in themselves be within the royal prerogative.

SHERIFF JAMESON OF ABERDEEN.

DEATH has recently made heavy calls on the supreme and local tribunals of Scotland. Not the least distinguished in the mournful catalogue is that of the respected gentleman above-named. He was a son of Andrew Jameson, who for upwards of forty years was Sheriff-Substitute of Fifeshire, and for many years the father of that class of judicial functionaries. He entered into office when Sheriff Courts had small jurisdiction and were of less repute. A sheriff-substitute was then little more than the clerk or secretary of the principal and non-resident sheriff, and his salary was so illusory that it was supplemented by all sorts of extraneous and incongruous offices. The father of the subject of this sketch was mainly instrumental in raising the *status*, and with that the salaries, of the local sheriffs, and in extending the jurisdiction and improving the administration of justice in Sheriff Courts. His son Andrew possessed the same high qualities which distinguished the father—sound sober sense, undaunted perseverance, and high consciousness in discharge of duty. He was called to the Scotch Bar in 1835, and soon thereafter was appointed Sheriff-Substitute of Ayrshire. He was removed to the like office in the metropolitan county, which he filled with much distinction for about twenty years. So eminent was his excellence as a judge, that in the year 1865 he was promoted to the office of principal sheriff

of the large and important county of Aberdeen, being only the third instance of such promotion in Scotland. Mr. Jameson had a constitutional delicacy in the throat, which prevented him taking the place he otherwise would in forensic pleading, but which enabled him to devote more time to other and severer studies. The same cause compelled him frequently to sojourn in more temperate regions than his fatherland. In these sojourns he became ultimately acquainted with continental laws and general principles of jurisprudence. He was twice called on to apply his extensive knowledge to the formation of codes, civil and criminal, for the island of Malta. These productions were admitted by highest authorities to have been eminently successful, and remain imperishable monuments of his great legal industry. Sir P. Stuart, the Governor of Malta, described these laws as exhibiting "a more extensive knowledge of the provisions of the continental codes, as well as an intimate acquaintance with the general principles of criminal legislation." Lord Derby expressed his "deep sense of the ability and learning which Mr. Jameson had brought to bear on the subject." The celebrated jurist, Mittermayer, of Heidelberg, added his tribute of commendation to the works. More appropriately, Mr. Jameson was offered an opportunity of applying his laws to practice. He was offered the office of Chief Secretary of the island, but which he modestly declined. His frequent sojourns on the continent brought him in intimate connection not only with the jurists but with the theologians of other lands. His strong religious sentiments led him to take an active interest in the evangelisation of Italy and other foreign lands. As an office bearer in the Free Church of Scotland his name was foremost in every effort for the good of mankind at home and abroad, and it will be long before the void in this quarter occasioned by his premature death is completely supplied. His latter end was mournful in the extreme. A son was resident in Glasgow, preparing for a mercantile career. He was attacked with that mysterious malady—diphtheria. The father, oblivious to his own susceptibilities in that respect, with his wonted zeal and courage, for a time became the anxious nurse of his son. The young man having shown symptoms of recovery, the father returned to his duties in Edinburgh. He scarcely had returned, when there appeared in himself symptoms of the fatal disease. His beloved son had a relapse, under which he soon sank. The death was communicated to the father, and who next day followed his son in death. His life was one laborious and useful, and its close perfect peace. He departed this life 30th October last, aged fifty-nine. The highly respected Sheriff-Substitute at Aberdeen, Mr. Comries Thomson, at the sitting of the Court next following the decease of the Sheriff-Principal, spoke a funeral oration, which, because of its truthful exposition and excellent taste, we could have wished to have inserted *in extenso* in our pages. None who knew the respected judge but will heartily subscribe to the truth thus spoken, that "by his removal the public has lost one of its ablest, most experienced, and most devoted servants, society has been deprived

of an honest, lovable, and accomplished man, while the Church has to mourn for an active and yet most humble Christian."

THE HON. WILLIAM HUME BLAKE.

WE record the death, at Toronto, on the 15th of November, of the Hon. William Hume Blake, Ex-Chancellor of Upper Canada, in his sixty-second year. The *Canada Law Journal*, commenting on his death, says:—

"Although some years have passed since Mr. Blake retired from his position on the Bench, and thus practically severed his connection with the profession, we cannot permit the occasion to pass without a tribute to his memory. He was born in the county of Wicklow, Ireland, on the 10th March, 1809, at Kiltegan. Of this parish, his father, the Rev. Dominick Edward Blake, who died at the early age of fifty from the same disease which has now carried off his son, was Rector. He was educated at Trinity College, Dublin, and was at first intended for the medical profession, having studied under Sir Philip Crampton. He subsequently thought of entering the Church, as in fact did his brother, the Rev. D. E. Blake, late Rector of Thornhill. In 1832 Mr. Blake emigrated to Canada, and settled in the township of Adelaide, with other members of his family, having shortly before he left Ireland married his cousin, Catherine Hume, the grand-daughter of William Hume, M.P., for Wicklow, well known in his day as a loyal gentleman, murdered by the rebels in 1798. He commenced the study of the law in 1834, in the office of Mr. Washburn; and though he began his legal studies later in life than is usual, he set to work with so much energy that he appeared to compress into a few years the work usually allotted to many. He formed a partnership with Mr. Joseph C. Morrison, now the senior Puisne Judge in the Queen's Bench, and they were afterwards joined by the late Dr. Connor, who, as well as his partners, was also, in 1863, elevated to the Bench. Though for several years one of the most able, fearless, eloquent, and successful of advocates, Mr. Blake will be best remembered in his intimate connection with the Court of Chancery, as its first chancellor. The reformation of this Court was undertaken by the Baldwin-Lafontaine Government, of which Mr. Blake was Solicitor-General, in 1843; and it was then established on its present footing mainly through Mr. Blake's exertions. He was naturally selected by his colleagues as the proper and most desirable person to fill the seat of Chancellor, to which he was appointed on the 30th September, 1849; and the wisdom of the choice was proved by the thorough and efficient manner with which he set to work to remodel and thoroughly renovate and reform the then existing system of Chancery practice in every branch and detail.

"Mr. Blake was a warm politician of the liberal school; and in those days when politics ran high, he was never accused of being lukewarm in his adherence to his party. . . . Whilst Sir Edmund Head was Governor-General, Mr. Blake was appointed

Chancellor of the University, and zealously and earnestly devoted himself to the task of raising the University to the honourable position which it now occupies. All who were brought in contact with him will bear testimony to the manner in which he discharged the duties of this office. In 1862 ill-health compelled the chancellor to resign his seat on the Bench; but though he was afterwards appointed one of the judges of the Court of Appeal, he was never able to undertake any judicial duties."

THE TREASURY AND THE BAR.

The following important communication has been received by the Assistant Judge of the Middlesex Sessions, from the Treasury in reference to the Bar and solicitors practising at that Court:—

"Treasury Chambers, November, 1870.

"SIR,—With reference to the return of criminal prosecution expenses for the county of Middlesex, in the half-year ended June 30, 1870, I am desired by the Lords Commissioners of Her Majesty's Treasury to state that in all cases at the sessions, where the number of witnesses does not exceed four, they have reduced the fee to counsel to 23s. 6d., which they consider to be sufficient when no explanation is offered to justify a higher fee, and throughout the accounts their Lordships have allowed 12s. 6d. for brief instead of 21s. and upwards, in accordance with the arrangement made many years since, that the former sum should be allowed to the county solicitor for copy of depositions in every case in his conducting the prosecution, any solicitor retained by the prosecutor himself for this purpose being only recognised as acting on behalf of his client. Should any explanation be desired on this or any other point, the examiner of criminal law accounts will be glad to confer with yourself or the deputy clerk of the peace on an appointment being made for that purpose.

"Three unsigned orders are herewith returned to be included when signed in the next return. The remaining disallowances and reductions are similar to those mentioned in former communications from this board.

"I am to add that great inconvenience is occasioned by the separation in the return of the orders for expenses, for supplementary orders, for professional allowances, payments of additional witnesses, &c., and all orders connected with the same case should follow one another regularly. Much trouble and loss of time would be saved by arranging the cases in the order in which they stand in the calendar.

"In future the particular session to which each prisoner was committed must be stated in the order for the conveyance of convicts, or the expenses of their conveyance cannot be allowed.

"I am, Sir, your obedient servant,

"J. STANSFELD."

The members of the Bar have agreed to appoint a committee to consider and act in such a manner as might be deemed expedient.

SITTINGS OF THE JUDGES.

According to a Parliamentary paper just published, the Lord High Chancellor during the past year sat for 146 days, seventy of which were devoted to the hearing of appeals and the Committees for Privileges in the House of Lords, and seventy-six days in the hearing of appeals in the Court of Chancery. The Master of the Rolls sat 174 days, the Lord Justice 130 days, and the three Vice-Chancellors 169, 172, and 172 days respectively. In the Court of Exchequer the Lord Chief Baron sat 226, Baron Martin 297, Baron Bramwell 148, Baron Channell 169, Baron Pigott 195, and Baron Cleasby 216 days. The judge of the Court of Probate and for Divorce and Matrimonial Causes sat 219 days during the past year; the judge of the High Court of Admiralty sat 133 days, and the assistant-judge of the Middlesex Court of Sessions sat ninety days.

THE NEW YORK CODES.

WE have frequently had occasion of late to animadvert on the shortcomings of the Codes of New York—a work which has by many been much praised, perhaps not so much as a triumph of legal learning in the compilers, as the accomplishment of a feat which has baffled the energies of law reformers for the last quarter of a century. Our learned contemporary, the *American Law Review*, in noticing the articles contained in ours on that subject, comments upon the Code in the following manner:—

“This number begins with an article on the Civil Code of New York, a work which has met with very undeserved and very ignorant praise in England. This article will show, to any one who cares to know, that the Civil Code is nothing but a text-book, and a very poor one.”

Such a statement coming from the quarter it does is entitled to every respect, and we hope it will not be long before an attempt is made to amend and otherwise improve a work, the basis and introduction of which have bidden so fair to give general satisfaction.

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Michaelmas Term, 1870.

At the final Examination of Candidates for Admission on the Roll of Attorneys and Solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Seddon Bowman Smith, John Titterington Bownass, Edward Augustus Salmon, Richard Seddon Toller, Thomas Astley Horace Hammond, B.A.

The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books:—To Mr. Smith, the Prize of the Honourable Society of Clifford's Inn; Mr. Bownass, the Prize of the Honourable Society of Clement's Inn; Mr. Salmon, Mr. Toller, and Mr. Hammond, Prizes of the Incorporated Law Society.

The Examiners also certified that the following Candidates, under the age of 26, passed examinations which entitle them to commendation:—Uriah Bower Brodribb, B.A., George Crossby, Edward Amphlett Davis, Edward Downes, Arthur Gough Harvie, Francis Creed Mayer, Samuel Wells Page, Edward Henry Plant. The Council have accordingly awarded them Certificates of Merit.

The Examiners further announced to the following Candidates that their answers to the questions at the examination were highly satisfactory:—Arthur Evans, Edward Duncombe Eagles, Henry Sandford. That Mr. Evans would have been entitled to a Prize, and Mr. Eagles and Mr. Sandford to Certificates of Merit, if they had not been above age of 26.

The Examiners also reported that among the Candidates from Liverpool in the year 1870, Mr. Seddon Bowman Smith passed the best examination, and was, in the opinion of the Examiners, entitled to honorary distinction. The Council have therefore awarded to Mr. Smith the Prize, consisting of a gold medal, founded by Mr. Timpron Martin, of Liverpool. The gold medal founded by Mr. John Atkinson, for Candidates from Liverpool or Preston, who have shown themselves best acquainted with the law of real property, and the practice of conveyancing, has been awarded to Mr. Lionel Barned Mozley, of Liverpool.

The Examiners also reported that among the Candidates from Birmingham in the year 1870, Mr. Joseph Bennett Clarke was entitled to honorary distinction. The Council have accordingly communicated this report to the Birmingham Law Society. Mr. Frederick Huxley, having, among the Candidates in the year 1870, shown himself best acquainted with the law of real property and the practice of conveyancing, the Council have awarded to him the Prize, consisting of a gold medal, founded by Mr. Francis Broderip, of Lincoln's Inn.

The number of Candidates examined this term was 132: of these, 125 passed, and 7 were postponed.

BAR EXAMINATIONS.

At the general examination of students of the Inns of Court, held at Lincoln's Inn Hall, on the 28th, 29th, and 31st October, and the 1st November, 1870—

The Council of Legal Education awarded to John Garforth Cockin,

Esq., Lincoln's Inn, a studentship of fifty guineas per annum, to continue for a period of three years; Seward William Brice, Esq., Inner Temple, an exhibition of twenty-five guineas per annum, to continue for a period of three years; William Bowen Rowlands, Esq., Gray's Inn, a certificate of honour of the first class; and to William Appleton, Esq., Richard Thomas Burney, Esq., (including Hindu law, &c.), Dennis Fitzpatrick, Esq., (including Hindu law, &c.), Henry William Gibson, Esq., (examined in Hindu law, &c., only), Richard Luck, Esq., Cornelius Carden Masters, Esq., Charles James Tarring, Esq., Inner Temple; John Harry Boome, Esq., Walter Mytton Colvin, Esq., Henry Anselm de Colyar, Esq., Charles Coleman Dillon, Esq., James Broughton Edge, Esq., Edward Walker Brandard Malkin Hance, Esq., Charles William Hoskin, Esq., John Edwin Howard, Esq., (including Hindu law, &c.), George Charles Kilby, Esq., Benjamin Law, Esq., James Henry Nelson, Esq., (including Hindu law, &c.), Edwin Pears, Esq., Middle Temple; Thomas Maitland Gibson, Esq., George Knox, Esq., Samuel Lee, Esq., Edward Stanley Roscoe, Esq., Lincoln's Inn; and George Welby King, Esq., Gray's Inn, certificates that they have satisfactorily passed a public examination.

CALLS TO THE BAR.

Michaelmas Term, 1870.

MIDDLE TEMPLE.—Archibald Brown, M.A., University of Edinburgh, and B.A., Christ Church, Oxford; holder of a certificate of honour awarded by the Council of Legal Education in Trinity Term, 1870; Charles John Sugrue, B.A., University of London, and of the Irish Bar; John MacDougall Joy, of Trinity College, Dublin; Henry Bampton, B.A., Christ's College, Cambridge, and B.A., Trinity College, Oxford; Francis Henning Pain, LL.B., Trinity Hall, Cambridge; George Randolph Kennedy, B.A., Brasenose College, Oxford; David Sutherland, Charles Eugene Velge, Richard James Quin, B.A., LL.B., Trinity College, Dublin; Charles William Hoskin, Edwin Pears, LL.B., University of London, Exhibitioner in Constitutional Law and Legal History, July, 1870; William Channel Bovill, Edwin Bathurst, William Meigh Goodman, B.A., University of London; Arnold de Beer Baruchson, Edward Morehead Wood; Alfred Beamish, B.A., Trinity College, Dublin; François Stanislas Edouard Pelte; Edward Walker Brandard Malkin Hance, LL.B., University of London, Esqs.

INNER TEMPLE.—Paul Ferdinand Willert, M.A., Oxford; Henry Bargrave Finnelly Deane, B.A., Oxford; Philip Howard Smith, B.A., Cambridge; Ralph Bagnall Bagnall-Wild, B.A., Cambridge; James Blackburn; Charles Edward Malden, B.A., Cambridge; Richard Ousely Blake Lane, B.A., Dublin; Frank John Fenton, B.A., Cambridge; Oriel Farnell Walton, B.A., Oxford; Robert John Beadon, B.A., Oxford; Frederic Marshall, B.A., LL.B., London; Robert Montagu Tabor, B.A., Cambridge; Henry William Gibson; Henry Francis Auldjo, M.A., Oxford; James Somervell, jun., B.A., Oxford; Joseph Gunning Simonds Fitz-Simon; James George Best, B.A., Cambridge; Thomas George Adams Palmer; Peter Sophocles John, London; and William Barker Rose, Esqs., the Hon. Ralph Arthur Douglas Elliot, B.A., Cambridge.

LINCOLN'S INN.—John Garforth Cockin, University of London, holder of Studentship, Michaelmas Term, 1870; Henry Leland Harrison, Oxford; Francis Hill Baynes, M.A., Oxford; Howel Jeffreys, B.A., Oxford; Harry

Lacey Frazer, B.A. and LL.B., Cambridge; George Knox, B.A., Sydney University and Cambridge; Richard Marrack, B.A., Cambridge; Francis Patrick, M.A., Cambridge; William Johnson Kaye, B.A., Cambridge; George Royle; Thomas Lancelot Croome, B.A., Cambridge; Henry Moe Keary, B.A., Cambridge; Henry Charles Deane, Exhibitioner in Equity and Real Property; Dadabhai Dossabhai Cama, University of Bombay; and Robert Pughe Jones, B.A., Cambridge, Esqs.

GRAY'S INN.—George Edwards, Lee prizeman, 1868; George Welby King, Common Law exhibitioner, July, 1869, and real property law exhibitor, July, 1870.

Hilary Term, 1871.

MIDDLE TEMPLE.—Hector Graham Browne; James Henry Nelson, M.A., Cambridge (late Fellow of King's College); Henry Denny Warr, M.A., Cambridge (Fellow of Trinity Hall); Frederick John Staples-Browne, Benjamin Law, M.A., Oxford; Walter Mytton Colvyn, LL.B., Cambridge; Charles Metcalfe Dick, Francis Smith, George Laughton, Richard Ingram, Dansey, B.A., Oxford; James Cruikshank Roger, William Augustus Bonnaud, Edmund Albert Nuttal Royds, George Charles Kilby, Charles Coleman-Dillon, Jacob Thomas Geoghegan, B.A., Trinity College, Dublin; and Edgar Hutchinson Little, M.A., Oxford, Esqs.

INNER TEMPLE.—Henry Herbert Stephen Croft, M.A., Cambridge; Cornelius Neale Dalton, M.A., Cambridge; Henry Wagner, M.A., Oxford; William John James, B.A., Cambridge; Francis Henry Blackburne Daniell, M.A., Cambridge; William Wightman Wood, B.A., Oxford; William Henry Walter Ballantine, LL.B., Cambridge; James Jardine, M.A., Cambridge; Arthur Edward Clarke, B.A., Cambridge; Charles Welsby, B.A., Cambridge; Henry Anchade Harben, B.A., London; John Henry Crawford, B.A., Oxford; Charles James Tarring, B.A., Cambridge; Isaac Richard Reece, B.A., Cambridge; Thomas James Sanderson, Cambridge; Percy Gye; the Hon. Frederick George Lindley Wood, B.A., Cambridge; Edmund Kelly Bayley, LL.B., Cambridge; Henry Lyon Anderton, B.A., LL.B., Cambridge; Edward Morten, B.A., Cambridge; George Flood France, B.A., Oxford; and George Herbert Morrell, M.A., Oxford, Esqs.

LINCOLN'S INN.—Sidney James Owen, M.A., Oxford; Alexander William McDougall, B.A., Cambridge; James Lempriere Hammond, M.A., Cambridge (Fellow of Trinity College); Eaglesfield Bradshaw Archibald Lockhart Smith, M.A., Cambridge (Fellow of Christ's College); Christopher Henry Edmund Heath, B.A., Oxford; Percy Mitford, Russell Donnithorne Walker, B.A., Oxford; John Timms, B.A., Cambridge; William Rann Kennedy, B.A., Cambridge (Fellow of Pembroke College); Arthur Johnston Mackey, B.A., Oxford; Wallwyn Poyer Burnett Shephard, B.A., Cambridge; Robert Wardrop, University of Edinburgh; Thomas Maitland Gibson, B.A., Oxford; Henry Ernst Hall, B.A., Cambridge; George Pemberton Leach, B.A., Oxford; Edward John Watson, B.A., Cambridge; William Wilbraham Ford, B.A., Oxford; Jamshedji Jivanji Gazdar, M.A., Bombay University; Hormusjee Pestonjee, B.A., Bombay University; Harold Carlyon Gore Browne, B.A., Cambridge; Alexander Robertson, M.A., University of Edinburgh; and George Robert Elsmie, University of Aberdeen, Esqs.

GRAY'S INN.—William Bowen Rowlands, M.A., Oxford (Certificate of Honour, first class, Michaelmas Term, 1870).

APPOINTMENTS.

Mr. Justice Keating and Mr. Justice Lush have been selected as Election Judges for the Common Pleas and Queen's Bench respectively for the ensuing year.

Mr. J. R. Davidson, Q.C., has been appointed Judge Advocate-General, in succession to Sir Colman O'Loughlen.

Mr. George Clive, Barrister-at-Law, has been appointed Chairman of the Herefordshire Quarter Sessions, in the room of the late Mr. John Freeman.

Mr. Serjeant Tindal Atkinson has been appointed County Court Judge of Circuit No. 28, in the place of Mr. A. J. Johnes, resigned.

Mr. W. T. Greenwood, of the Northern Circuit has been appointed Recorder of Berwick-upon-Tweed, in the place of Mr. Ingham, Q.C., resigned; Mr. Thomas Gunner, of the Western Circuit, appointed Recorder of Southampton; and Mr. F. A. Philbrick, of the Home Circuit, Recorder of Colchester, in the place of Mr. Bushby.

Mr. G. J. P. Smith, Barrister-at-Law, has been appointed one of the Masters of the Court of Queen's Bench.

The Joseph Hume Scholarship in Jurisprudence, of 20*l.* per annum, of the University College, tenable for three years, has been awarded to Mr. George Serrell, M.A., London.

Mr. J. T. Hibbert, M.P., Barrister-at-Law, has been appointed Under-Secretary of State for the Home Department, in succession to Mr. E. H. Knatchbull-Hugessen, transferred to the Colonial Office.

Sir Andrew Fairbairn, Barrister-at-Law, has been elected Chairman of the Leeds School Board.

Mr. T. Erskine May, Barrister-at-Law, has been appointed to succeed Sir Dennis le Marchant, as Clerk of the House of Commons.

Mr. Horace Brooke, Barrister-at-Law, has been appointed Secretary to Lord Justice Mellish.

Mr. E. J. S. Edgecombe, Barrister-at-Law, has been appointed Private Secretary to the Chairman of the London School Board, Lord Lawrence.

Mr. Richard Williams, Solicitor, has been appointed Town Clerk of Beaumaris; Mr. C. F. Preston, Solicitor, Town Clerk of Barrow-in-Furness; Mr. Thomas Speechly, Solicitor, Deputy Registrar of the City of London Court.

Mr. E. P. Jones, Solicitor, Registrar at Whitechurch, of the County Court; Mr. H. G. Faher, Solicitor, Clerk to the Stockton School Board; Mr. T. H. Kirby, Solicitor, Clerk to the Coventry School Board; Mr. J. T. Belk, Solicitor, Clerk to the Middlesborough School Board; Mr. J. R. Donald, Solicitor, appointed Auditor of the West Cumberland Audit District, by the Poor Law Board, in the room of the late Mr. Yarker; Mr. B. J. Wilkinson, Law Clerk to the Bermondsey Vestry; and Mr. A. B. Salmon, Clerk to the Magistrates of the Ulverston Petty Sessional Division.

IRELAND.—The following changes, consequent on the death of Mr. Charles Shaw, Q.C., have taken place:—Mr. O'Hagan, Q.C., from the Chairmanship of Westmeath to that of Leitrim; Mr. William Newell Barron, Q.C., from the Chairmanship of Kerry to that of Monaghan; and Mr. Charles H. Hemphill, Q.C., from the Chairmanship of Leitrim to that of Kerry. The vacancy caused by the recent death of Mr. James M'Mahon, District Registrar at Limerick, has been filled by the transfer thereto from the Principal Registry of Mr. Henry Begley, the Second Clerk of the Entries; Mr. E. W. Costello, Barrister-at-Law, has been appointed Senior Crown Prosecutor for the County of Mayo, vice Mr. P. J. Blake, resigned, and Mr. C. P. O'Flaherty, Barrister-at-Law, Junior Crown Prosecutor for the same County, vice Costello, promoted.

SCOTLAND.—Sheriff-Substitute Guthrie Smith has been appointed Sheriff of Aberdeen and Kincardine. Mr. Archibald Reid, Sheriff-Clerk, has been appointed Commissary-Clerk of Perthshire, and Mr. John Cheyne, Sheriff-Substitute for the Dundee District of Forfarshire, in the room of Mr. J. Guthrie Smith, resigned.

INDIA.—Mr. George Campbell, Barrister-at-Law, has been appointed to the office of Lieutenant Governor of Bengal; Mr. G. C. Sconce, Barrister-at-Law, Clerk of the Court of Small Causes at Calcutta; Mr. C. P. Cooper, Barrister-at-Law, to act as Master and Registrar in Equity in the High Court of Bombay; Mr. William Stokes, Secretary to the Government of India in the Legislative Department; Mr. G. C. Paul, Barrister-at-Law, to officiate as a Judge of the High Court of Judicature in Bengal during the absence of the Hon. W. Markby.

MAURITIUS.—Mr. G. B. Colin has been appointed Procureur Advocate-General, in succession to Mr. John Gorrie.

St. HELENA.—Mr. W. A. Parker, Chief Justice, has been appointed a Member of the Executive Committee.

SIERRA LEONE.—Mr. Charles Fyfe, Barrister-at-Law, has been appointed Queen's Advocate.

Necrology.

October.

- 4th. TEMPANY, Edward, Esq., Solicitor, aged 33.
- 5th. NETTLESHIP, Henry J., Esq., Solicitor, aged 63
- 8th. TELFAIR, C. Robert, Esq., Barrister-at-Law, aged 48.
- 16th. HACKER, J. Heathcote, Esq., Solicitor, aged 76.
- 21st. SCADDING, E. Ward, Esq., Solicitor, aged 77.
- 21st. RUST, Thomas, Esq., Barrister-at-Law, aged 53.
- 22nd. KIRWAN, A. Valentine, Esq., Barrister-at-Law, aged 66.
- 23rd. TOURNAY, Robert, Esq., Solicitor, aged 71.
- 25th. TILSLEY, G. Fawler, Esq., Solicitor, aged 75.
- 25th. HUGHES, John, Esq., Solicitor, aged 47.
- 25th. LAW, George, Esq., Solicitor, aged 83.
- 27th. MURRAY, William, Esq., Barrister-at-Law, aged 73.
- 28th. BROWNE, J. Rogers, Esq., Solicitor, aged 47.

November.

- 8th. BENTLEY, H. William, Esq., Solicitor, aged 51.
- 15th. CLIFTON, J. Hall, Esq., Solicitor.
- 15th. WILLIAMS, W. Q., Esq., Barrister-at-Law, aged 42.
- 16th. DAWSON, F. D. Massy, Esq., Barrister-at-Law, aged 67.
- 18th. Hyme, George, Esq., Taxing Master of the Court of Chancery.
- 23rd. SHACKELFORD, J. Shuckburgh, Esq., Barrister-at-Law,
aged 67.
- 23rd. REW, Rev. W. A., Esq., D.C.L., Barrister-at-Law.
- 27th. ROWLEY, J. Campbell, Esq., Solicitor, aged 40.
- 28th. ARCHBOLD, J. Frederick, Esq., Barrister-at-Law, aged 85.

December.

- 1st. BRANSTON, J. William, Esq., Barrister-at-Law, aged 57.
- 2nd. PAYNE, R. Ecroyd, Esq., Solicitor.
- 3rd. SHEPPARD, H. Richard, Esq., Solicitor, aged 38.
- 4th. SUDLOW, John, Esq., Solicitor, aged 49.
- 5th. WALTER, H. Finlay, Esq., Solicitor.
- 8th. YARKER, R. Francis, Esq., Solicitor.
- 11th. LING, Henry, Esq., Solicitor, aged 66.
- 18th. JEFFERSON, J. William, Esq., Solicitor, aged 31.
- 21st. GLOVER, Mr. Serjeant, LL.D.
- 24th. HALL, T. Henry, Esq., Barrister-at-Law, aged 74.
- 26th. BOURKE, Walter, Esq., Q.C., aged 67.
- 26th. BRANDT, William, Esq., Barrister-at-Law, aged 40.
- 31st. HINCHLIFF, Edwin, Esq., Solicitor, aged 30.
- 31st. AYKBOURN, T. H., Esq., Barrister-at-Law, aged 94.

January.

- 3rd. DAWES, Thomas, Esq., Solicitor, aged 97.
 - 3rd. GIBSON, W. Sidney, Esq., Barrister-at-Law, Registrar of the
Newcastle Court of Bankruptcy.
 - 7th. WATERFIELD, Charles, Esq., Barrister-at-Law, aged 64.
 - 7th. LATHAM, Henry, Esq., Barrister-at-Law.
 - 8th. HOARE, Charles R., Esq., Barrister-at-Law.
 - 9th. PEARCE, John, Esq., Solicitor, aged 44.
 - 13th. COOPER, Frederick W., Esq., Barrister-at-Law, aged 34.
 - 14th. WALL, John, Esq., Solicitor, aged 82.
 - 15th. CODD, A. Gamble, Esq., Barrister-at-Law, aged 55.
 - 15th. OVEREND, Thomas, Esq., Solicitor, aged 74.
 - 17th. BANKS, Richard, Esq., Solicitor, aged 79.
 - 21st. TEMPLE, Christopher, Esq., Q.C., aged 79.
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AND
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MARCH TO AUGUST, 1871.

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No. LXI.

ART. I.—ESTATES TAIL IN INDIA.

IT is not a little surprising that the decisions of the Courts of British India excite but a feeble interest in the minds of English lawyers. In a large number of cases an Indian judge has no precedents and very few analogies to rest upon, and is obliged to base his judgment upon the broad rules of general jurisprudence. Charters secure the natives in the possession of their own laws, but Hindu law is a heritage derived from times remote from the present, and the system regarded as a whole is as fragmentary as the primitive laws of the Barbarians. In administering it the Indian judge has a task not unlike that which exercised the jurists of Bologna, and he can work with a freedom such as our early chancellors, or the inventors of recoveries, enjoyed.

All law, according to Hindu belief, springs from the sacred writings or *Shasters*, which are the direct, or indirect, utterances of the divine voice. They were evidently composed before law, religion, and morality were separated in thought, and the belief in a revelation, from which rules applicable to every case may be deduced, makes it almost

impossible to call in the aid of direct legislation. The system was in the first instance built up by men claiming only the title of expositors, and even now, when novel cases arise, the judge must discharge the delicate function of interweaving rules which shall accord with ancient principles and yet meet the exigencies of to-day.

In the development of Hindu law local circumstances have produced diversity, and five independent schools are enumerated. Their differences are not very great, and the most important are those which separate the Bengal school from the rest. Upon this it is sufficient to observe, that in Bengal proper a Hindu has long been able freely to dispose of all his property, whether ancestral or self-acquired, by acts *inter vivos*. The prohibitions of the *Shasters* are respectfully eluded, by holding that they are religious precepts not imposing any legal obligation. It is scarcely necessary to say, that the artificial distinction between real and personal property is unknown in any school. Testamentary power is of more recent growth. According to the better opinion, wills and testaments are wholly unknown to native Hindu law,* and there seems good reason to believe that they have been borrowed from the Mahometan or European conquerors. But it may now be considered as established, that throughout India a Hindu has a power of disposition, by will at least, as ample as his power of disposition by conveyance, or other act *inter vivos*,† and that consequently in Bengal “a man who is the absolute owner of property may now dispose of it by will as he pleases, whether it be ancestral or self-acquired.”‡

In all countries testamentary dispositions give rise to questions of greater intricacy, than conveyances *inter vivos*.

* Macn. Prin. and Prec., p. 3. Sir Thos. Strange's Hindu Law, Vol. I., p. 254. See also Sir F. Macnaghten's Considerations, p. 318.

† *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*, 12 Moore, Ind. App., 1.

‡ *Nagalutchmee Ummal v. Gopoo Nadaraja Chetty*, 6 Moore, Ind. App., 309, 344.

We are desirous of directing the reader's attention to the argument and judgment in a recent case which affords a singular illustration of this fact.* According to Hindu belief a dead owner derives benefits from the oblations offered to him by his heirs, and it is this consideration which determines the order of intestate succession. Those are preferred whose offerings have the greater efficacy. Sons occupy the first place, and they take equally as co-heirs in order to increase the number of equally efficacious oblations. It results from this rule that land is continually subdivided. This consequence Prasanna Kumar Tagore, an eminent Hindu lawyer of Calcutta, regarded as opposed to social and political expediency, and as he was familiar with our law of real property, he thought that the machinery of an English settlement might advantageously be employed to remedy the evil.

Accordingly he made a will by which he gave all his property to trustees absolutely. After certain temporary purposes were satisfied they were directed to convey the real estate upon certain specified limitations, "so far (but so far only) as such limitations or directions could be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which might then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there should be)." The limitations, omitting some which in the state of things existing at the testator's death could not possibly take effect, were—To the use of the testator's son, Jatindra Tagore, for life, and after the determination of that estate, to the use of each of the sons of Jatindra successively, according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male

* *Ganendra Mohan Tagore v. Upendra Mohan Tagore*, 4 Beng. L.R., O.C.J., 103. It will in the following pages be referred to as *Tagore v. Tagore*.

of his body might be preferred to the younger of such sons and the heirs male of their respective bodies. Upon the failure of the prior limitations the estate was limited to the use of the eldest son of Lalit Tagore, who should be born in the testator's lifetime, for life, with remainder to the first son of such eldest son and the heirs male of his body. The nature of the estate, and the order of succession which the testator desired to establish, were clearly pointed out in the following declaration:—

“I declare that sons by adoption shall be deemed younger than sons who are the issue of the body of their father, and that the elder line shall always be preferred to the younger, and that every elder son of each heir in succession by descent, and failing descent, by adoption, and his issue or heir male by descent, and failing descent, by adoption, shall be preferred to every younger son and his issue by descent, or adoption, to the exclusion of females and their descendants, and to the exclusion of all rights and claims for provision or maintenance of any person, male or female, out of the estate. And I declare my will to be to settle my estate in manner aforesaid as fully and completely as a Hindu born and resident in Bengal may give or control the inheritance of his estate, or a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him, and not subject to any law or custom of England whereby an entail may be barred, affected, or destroyed.”

The state of things at the testator's death was this. He left two sons. The elder, Ganendra, had become a Christian, and was expressly excluded from taking under the will, but the testator had previously made some provision for him. The younger was Jatindra, named in the will, and he had no son. Lalit Tagore, named in the will, predeceased the testator, as also did Lalit's eldest son, Jaduki Tagore, but the latter left an only son, Sarat Chandra Tagore, who survived the testator. If, therefore, the will had applied to real property situate in England, there would have been no difficulty in

its interpretation. The estate would have been vested in trustees, who would be bound to hold and settle it to the use of Jatindra Tagore for life, with successive remainders in favour of the first and other sons of Jatindra in tail male, with remainder to Sarat Chandra Tagore in tail male. The inheritance expectant upon Jatindra's death would be in Sarat Chandra, subject to the liability to open and let in the estates of Jatindra's children. No rule against perpetuity would be violated, for the clause against barring the entail would be simply taken *pro non scripto*, and during the continuance of the estate tail of Sarat Chandra Tagore, the testator's heir-at-law, though entitled by descent to the undisposed of reversion in fee, would be unable to maintain a suit to restrain waste, or for any other purpose, in any court of Law or Equity.

Ganendra Tagore filed a plaint, in which he prayed a declaration that no estate beyond the life estate of Jatindra was validly created by the will, and that he, as one of the testator's sons, was entitled, *ab intestato*, to a share of the undisposed of reversion. The suit was heard in the first instance by Mr. Justice Phear, and subsequently on appeal by Sir Barnes Peacock and Mr. Justice Norman. The judgments contain a long and elaborate investigation of the meaning and effect of the gifts to Jatindra's sons, by which, according to English law, estates in tail male would be created.

The inquiry is one of much interest. Of course estates subject to all the incidents of our estates tail are quite unknown to Hindu law. It recognises, however, and upholds, special modes of succession prevailing in particular tribes or families, and primogeniture is not an uncommon family custom. In *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*,* the Privy Council decided that a zamindári in Bahar descended according to this rule. Prior

* 12 Moore, Ind. App., 1.

to the year 1793 it regulated the descent of many large zamindáris in Bengal,* and it has recently been sanctioned by a special Act as applicable to many of the táluks of Oudh.† Beyond the limits of Bengal a proprietor cannot in general alienate ancestral property to the prejudice of his male descendants, and a custom of primogeniture in a district where this principle is in force has many of the characteristics of a perpetual entail.

The charters by which the courts in India are constituted secure to the natives the benefit of their own laws in all cases of inheritance and of contract or dealing. Cases continually arise in which the authorities of Hindu law are utterly silent or give only an uncertain sound. It is just that the deficiencies of a particular system should be supplied from the store of general jurisprudence, and the English, like the Roman law, may be resorted to for principles common to all mankind. On questions of contract there is an agreement as to most of the leading principles amongst all civilised nations, and as the Hindu law is here almost silent, a large amount of English law is rightly and advantageously imported into the system. But there is a natural tendency in all lawyers to presume that their own system is the perfection of reason and natural justice, and unconsciously to conclude upon any given maxim that it is approved by universal law. Yet much of our system is based not upon general expediency, but upon local or particular convenience. Our law of real property is the result of the exigencies of the feudal system, and ever since the Norman conquest has been undergoing a continual process of legislative or judicial adaptation to the varying wants of society. Great caution is necessary when we seek to derive from it principles of universal application.

In the case under consideration‡ the judges accorded this character to the rule of English law, that a man cannot impress upon property any special path of descent. As ordinary

* See Beng. Reg., 1793, No. XI. † Act I., 1869.

‡ *Tagore v. Tagore* (*loc. cit.*)

freehold land cannot be made to descend according to the custom of gavelkind or borough English, so a Hindu cannot bid his land descend by the rule of primogeniture. It was also urged that if an estate tail were admitted, there was no means known to Hindu law by which it could be barred, and land might thus be rendered inalienable. These seem to have been the chief reasons which induced both Mr. Justice Phear and the Court of Appeal to hold that a grant to A. B. and the heirs of his body could not take effect according to its terms. The latter tribunal seems to have come to the conclusion that such a grant was wholly void, and passed no interest to the grantee. But Mr. Justice Phear had given a different decision upon this point. Words of limitation are no more necessary under Hindu law to confer absolute dominion than amongst us in the case of a gift of personalty. But as in the latter case the words of style, "executors, administrators, and assigns," are commonly added, so it is not unusual in a Hindu conveyance to give the estate to the grantee, "his sons, and his sons' sons." The words, "heirs male of his body," Mr. Justice Phear considered substantially equivalent to this expression, and he therefore held that the gift to Jatindra Tagore's eldest son, and the heirs male of his body, carried the whole interest not disposed of by the prior limitations—as we should say, carried the fee. If the rules of English law are applicable, this view seems more in accordance with them than the decision of the Court of Appeal. In the instance given by Littleton* it is laid down that "if a man give lands or tenements to another to have and to hold to him, and to his heirs *male*, or to his heirs *female*, he to whom such a gift is made hath a fee simple." And the well known rule in the construction of wills, that words which give an estate tail in realty pass the absolute interest in personalty, strengthens this conclusion.†

* Co. Lit., 27a, and see *Wiltes Claim of Peerage*, L.R., 4 Eng. and Ir. App., 126, 152.

† See 2 Jarm. on Wills (3rd ed.), p. 534.

But, in truth, the rule upon which the judges relied has not the slightest claim to be regarded as universal, and it is not a little singular to find *Sir Anthony Mildmay's case*,* Preston on abstracts, and a judgment of Lord St. Leonard's on the doctrine of *cyprès*,† cited as authorities upon the law common to all mankind. In Scotland, in Prussia, in France before the Revolution, and probably in all the countries of western Europe, except England, the maker of an entail may establish any order of succession that he pleases. Entails are an offshot from the *fidei commissa* of Roman law.‡ The Romans themselves seem to have gone no further than was necessary to keep property within the limits of a given family; nor does it seem to have occurred to any settlor to cause his property to devolve according to the rule of primogeniture, or any other special order. The property was given to the first taker, subject to a *fidei commissum* that neither he nor any subsequent taker should alienate it from the family.§ But when once the conception of a perpetual *fidei commissum* was admitted, a gift of property directed to devolve upon the members of the family, according to a prescribed order of succession, was a natural development of the idea, and this is a true description of the entails of Scotch law,|| of the family *fidei commissa* of German law,¶ and of the fidei-commissary substitutions existing in France before the Code Napoléon.** And it is not immaterial to observe that in Scotland, at all events, chattels, as, for instance, diamonds and pictures, may be directly entailed, and made to follow precisely the same course of devolution as entailed land.†† If strictly entailed they would, before the Act of 1848, be inalienable. But there is a difference,

* 8 Repp. 1a. † *Money Penny v. Dering*, 2 Do Gex, M. & G., 172.

‡ Sandford on Entails, pp. 13, 36; McKenzie on Tailzie, p. 484.

§ Dig. 31, tit. 88, s. 15. The obligation not to alienate was afterwards restricted to four degrees—Nov. 159.

|| 2 Bell on Conv., 934, 991.

¶ Allgemeines Landrecht für die Preussischen Staaten, Pt. II., tit. 4, s. 184.

** Toullier, Droit Civil, Vol. V., pp. 15, *et seq.*

†† Sandford on Entails, p. 253.

which is important to notice, between the Scotch and the continental entail. In the former, a prescribed order of succession does not imply any restraint upon the power of alienation, and therefore does not create a perpetuity. Under this form of gift, which is called a "simple destination," each taker is full owner, and can deal with the property as he pleases, but if he fails to do so the destination takes effect. Thus, to recur to Littleton's instance, a simple destination to a man and his heirs male creates an estate freely alienable, but heirs male only can take by descent, and the same would be true of a gift to A. B. and the heirs of his body, without more. To make a strict entail alienation must be expressly prohibited, and if appropriate clauses were introduced, the entail was until the year 1848 perpetual. But under the old French and the other continental systems, a simple destination implies a prohibition to alienate. Alienation is competent only so far as the power is expressly conferred.* In France strict substitutions are now prohibited by Art. 896 of the Code Civil.† But it has been several times adjudged‡ that in order to bring a fidei-commissary substitution within this prohibition, a "*charge de conserver*" must concur with a "*charge de rendre*." The latter alone does not make a prohibited substitution. And accordingly a gift to A upon trust as to what shall remain at his death for B is still lawful, and enures for the behoof of both A and B.§

It is obvious that the same reasoning applies to a case in which there are several successive substitutes. We may conclude therefore a gradual substitution, that is, a substitution by which property is given to several persons in

* Toullier, Droit Civil, Vol. V. p. 22. Merlin Repertoire de Droit, Art. Subst. Fid., s. 8. Mackeldey, Systema, s. 735.

† This article is as follows:—Les substitutions sont prohibées. Toute disposition par laquelle le donataire, l'heritier institué ou le légataire sera chargé de conserver et de rendre à un tiers, sera nulle, même à l'égard du donataire, de l'heritier institué ou du légataire.

‡ See Sirey's Code Civil Annoté, Art. 896.

§ Toullier, Droit Civil, Vol. V., p. 42.

successive grades, what we should call an entail, is still valid according to French law, provided that each taker has a full power of alienation.* And further, if in such a gift nothing was said about alienation, a prohibition to alienate would not now be implied.† A “simple destination” would therefore be valid and would have the same effect as in Scotch law.

The general principles applicable to novel questions of Hindu law are well expressed in the following observations of Sir J. Knight Bruce:—

“Whatever may have formerly been considered the state of that law as to the testamentary power of Hindoos over their property, that power has now long been recognised, and must be considered as completely established. This being so, we are to say whether there is anything against public convenience, anything generally mischievous, or anything against the general principles of Hindu law in allowing a testator to give property, whether by way of remainder or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately upon the close of a life in being. Their lordships think that there is not and that there would be great general inconvenience and public mischief in denying such a power.” ‡

If Hindu law yields no direct authority, the analogy of other systems may be called upon to suggest a rule, but the conclusion thus arrived at must be tested with a view to see that it is free from the vices pointed out by Sir J. Knight Bruce. A gift, then, to a man and the heirs of his body ought to have such effect given to it as, without violating the rule against perpetuity or any other general principle, comes nearest to the actual meaning of the words. To hold that such an expression operates as a simple destination is to

* See and consider note (1) to Toullier, *Droit Civil*, Vol. V., p. 44.

† Toullier, *Droit Civil*, Vol. V., p. 26, *et. seq.* Sirey's *Code Civil Annoté* Art. 896.

‡ *Sreenuttty Soorjcemoney Dossee v. Denobundoo Mullick*, 9 Moore Ind. App., 135.

adopt a rendering which is thoroughly supported by analogy, and gives full effect to the words without in any degree trenching upon the rules against perpetuity. The interest thus created would be quite as manageable as the entails of an ordinary English or Scotch settlement, and the tenure very similar to that under which many zamindáris are held, or to that which the Government have by Act 1 of 1869 impressed upon several of the táluks of Oudh at the request of the tálukdárs. An interest thus accredited cannot be considered as offending against public policy or convenience, nor does there appear to be any good ground for saying that it is repugnant to Hindu ideas or the general principles of Hindu law. It has indeed been said that such a disposition may deprive the testator of the spiritual benefits derivable from the sons or daughters. But we have seen that a Hindu in Bengal may wholly disinherit his children, and thus incur the risk of a total deprivation of funeral oblations, and it is impossible to maintain that he is not at liberty to make a partial disinheritance, by which a less serious risk is incurred. In the present case the testator was evidently attached to the religion, and to most of the customs of his fathers. Considerable sums are directed to be appropriated to the perpetual service of the family idols, and provision is made for various other expenses which Hindu observances may require. On this point, therefore, the authority of the testator himself is of some value, and on the whole we are justified in concluding that the construction suggested does not offend against "public convenience or the general principles of Hindu law."

It will not fail to be observed that the trust created by the will is executory. The testator is evidently aware that it may not be possible to carry out in its full extent the disposition which he meditates, and he shows an extreme anxiety not to violate any rule of law. The High Court in administering Equity is, we conceive, bound by the general principles of the procedure of Courts

of Equity in England, and, in framing a settlement in pursuance of an executory trust, ought to be guided by the liberal rules of construction prevailing in this country. If Hindu law will give effect to a "simple destination" of the kind that we have described, it is obvious that this form of disposition will be the nearest approach to the testator's intention, and it is unnecessary to consider whether he might have expressed his desires in apter or more technical language. If a Scotch testator had before 1848, by appropriate words and clauses, created a perpetual entail of a Scotch estate in favour of the grantee and his issue, and had directed trustees to settle an English estate upon the same limitations, "so far as they could be introduced into an English settlement without infringing any rule of English law against perpetuity," and had subsequently declared his will to be that the entail so created should not be barred, the Court of Chancery in executing the trust would, we conceive, give to the first taker under the Scotch entail either an estate tail, or possibly an estate for life, followed by remainders to his sons in tail. Probably the same course would be adopted if the Scotch entail were in favour of the grantee and his heirs male, and in this case it is certain that the Court would not adjudge that the disposition was void, and that the grantee could take no interest in the English estate.

ART. II.—LORD BROUGHAM'S AUTOBIOGRAPHY.

The Life and Times of Henry Lord Brougham. Written by himself. In three volumes. Vol. I. WILLIAM BLACKWOOD & SONS, Edinburgh and London. 1871.

WE must confess to having experienced a certain feeling of disappointment on receiving the first instalment of the Autobiography of Lord Brougham. We cannot say,

indeed, that our expectations were ever very highly wrought as to the completeness and accuracy of the memoirs which the illustrious Ex-Chancellor was known to have left behind him. The work was begun at too late a period in his life. There is a time for everything, and a time, therefore, for a man writing memoirs of himself. However interesting Nestor may be, even the most ardent student of the Iliad must admit that occasionally his evidence is not confined to the issue. After a certain period of life, a man of the most well balanced mind is too apt, under the influence of prejudice and feeling, to mistake the relative importance of former events and circumstances, to colour the past too strongly with his own personal views and memories, and to abstain in a manner often inexplicable from giving that information which might be most interesting to the generation amongst which he lingers, and to posterity itself.

An autobiography, to be worth anything, ought to be written by a man when he is in the full vigour of his faculties, and while he still holds the position which he has achieved in the world, unchallenged and secure, or has retired from it in peace and charity with all men, and in a serene frame of mind generally. At all events it is clear that when once decadence has begun, such a state is fatal to the value of a composition of this nature, because it introduces an element of which the effect is sure to be appreciable in the statements that are made and the views that are expressed; and the further the decadence has gone so much the more are the results likely to be unsatisfactory. It would be vain to expect that a biography produced under such circumstances should be so written,

Ut omnis,
Votivâ pateat veluti descripta tabellâ
Vita senis.

But in addition to these considerations, we must be allowed to question whether it is wise and judicious for

any man who has played an important part in public affairs to give to the world his own private comments on the events in which he has been engaged, and the men with whom he has been mixed up. A public man must be judged by his public words and actions, and posterity will not be inclined to treat with much respect any secret memoirs he may have left which are not fully borne out by external evidence. Explanations of peculiar circumstances in his career, which it may not have been prudent to give forth at the time, may no doubt be sometimes highly valuable and interesting, although these are of somewhat rare occurrence in the life of any man who acts an honourable and straightforward part in public affairs. Events of a personal nature which throw light on the character and career of a public man, will also possess some degree of interest when left by him in a biographical form. The circumstances, especially of his early life, which influenced his mind and aided in its development, will naturally be of value from the light they throw on his subsequent history, and from the psychological considerations which they suggest. If he has been a man distinguished for great acquirements and extensive knowledge, information as to his habits of study and the mode in which he disciplined his mind, will also be gladly received by those who have known him in the plenitude of his powers, and will not be without value to posterity. In the case of a member of the legal profession, who has achieved great eminence, a description by himself of the earlier portion of his career, of the difficulties he has overcome, and of his experience in the great struggle for existence, will be always sure to be interesting not only to his own fraternity, but to the public at large. These, and other matters of a cognate character, seem to be suitable subjects for a man who has occupied a large place in public estimation, to introduce into memoirs of himself, if he deem it necessary to leave such a record to posterity.

We are sorry to say that in all these respects the present work affords but little information which the most devoted

admirers of its illustrious author will very highly value. The account of his early life is no doubt interesting, but it does not contain much which was not known already, and the portion of it which relates to Dr. Robertson had appeared before in Lord Brougham's "Lives of Men of Letters, of the Time of George III." It is with pain, too, we see that those who have had the charge of this publication have allowed a translation of a tale by Voltaire, entitled "Memnon," to be given by Lord Brougham as a composition of his own at the age of thirteen. We have compared the translation with the original, and can certify as to its accuracy. It is obvious that Lord Brougham, having found the translation among his papers, or having in some way come across it, had wrongly supposed it to be an original composition, the date probably being supplied by the document itself. It is unfortunate, however, that near the beginning of the autobiography, such a mistake should have been made, as it shows how little the memory of the author was to be trusted at the time when he set about writing his memoirs. There is no doubt that Lord Brougham had been very familiar with the writings of Voltaire, and even within a comparatively recent period he had reviewed the principal works of the great French writer in the "Men of Letters, &c.," to which we have already referred. Even if he had entirely forgotten that "Memnon" was a composition of Voltaire, it is surprising that he did not detect its authorship from its resemblance to "Candide," or at least that he was not led to question his own claim to have written such a piece at the age of thirteen from the introduction of matters which a boy of that age could have known nothing about, unless the maxim, *malitia supplet ætatem*, could be applied.

This may appear to be a comparatively small matter, but it has certainly led us to doubt the wisdom of Lord Brougham's executor in following so closely, as he states he has done, throughout the publication, the peremptory order of the testator, to correct only mistakes in dates or proper names,

but to print the narrative as he had written it. The notice to the reader at the beginning of the volume is ominous, both in substance and in form; and we cannot but think that it would have been well if the executor, from respect to the memory of Lord Brougham himself, and from a desire to make the book really interesting, had, notwithstanding the injunction of November, 1867, exercised some considerable discretion. The chapters containing the visit to Denmark and Scandinavia, and the tour through Holland and Italy, might have been safely suppressed. They are in the form of a diary, and do not quite coalesce with the rest of the composition, besides being of great length. There is nothing very characteristic in them, and they do not contain the sort of information respecting the countries visited which is likely to be interesting after more than two generations from the time they were written. Many of the letters also, in the latter portion of the volume, are devoid of interest, and might have been wisely omitted. It is not pleasant to look forward to two other volumes, made up of similar materials, containing very little information about Lord Brougham himself, and throwing very little light on other men, or on public events. We sincerely trust, however, that there are good things to come.

There were two courses which might have been adopted with respect to the publication of the memoirs left by Lord Brougham, had a sound discretion been exercised by his executor, either of which would have been more satisfactory than that which has been followed. One plan would have been to adhere to the idea of an autobiography, which his lordship obviously had in his mind, and to omit or to shorten very greatly whatever did not strictly belong to a composition of this nature. In this way the work would have been much diminished in bulk, but it would have been greatly improved in interest, and not lessened in value. The other plan would have been to use the autobiographical and other writings, relating to himself, left by Lord Brougham, as materials for

a regular biography, written by some one who was duly qualified to estimate his many-sided character, and to record in a worthy manner the life of a remarkable man. Such a work would have been second in interest to no biography which has appeared in our day, and, if kept within moderate limits, would unquestionably have been popular. The unfortunate thing, with respect to the present publication, is that, while it is never likely to be extensively read, it will probably prevent any really good life of Lord Brougham being written, and that it will scarcely supersede the far from impartial work left by Lord Campbell, which has at once priority of possession and superiority of interest.

But whatever our own feelings or those of others may be, and we know they are shared by many, the decree has gone forth, and we must make the best of things as they are. We may not have such a portraiture as we could have wished, but still some interesting lineaments of a man of extraordinary powers are to be found in this volume. Although the account of Lord Brougham's early life does not contain much that was not known before, yet the information given is not without value. It is obvious that the influence of his maternal grandmother, Mrs. Syme, the sister of Dr. Robertson, tended materially to mould his character. "Remarkable for beauty," he says, "but far more for a masculine intellect and clear understanding, she instilled into me from my cradle the strongest desire for information, and the first principles of that persevering energy in the pursuit of every kind of knowledge, which more than any natural talents I may possess, has enabled me to stick to, and accomplish, how far successfully it is not for me to say, every task I ever undertook." It has often been lamented that Lord Brougham had not adhered more closely to one pursuit, but it may be doubted, perhaps, whether such a thing was possible in a man of his intellectual character. In the notes written by his mother, in 1826, it is stated that his grandmother "used to compare him to the admirable Crichton, from his excelling in everything he

undertook." It is quite obvious, therefore, that the pursuit of the universal, which he displayed to some extent throughout his life, did not spring from mere vanity or restlessness, as some have supposed, but was the natural and inherent tendency of his mind. It is obvious, too, that this tendency was never checked by the circumstances of his life at any period. He was never compelled at any time throughout his whole career to limit his exertions to one field. The vigour of his mental powers rendered it unnecessary for him to concentrate them as other men are obliged to do, if they would achieve success. Thus in a letter to Lord Grey, in 1808, before joining the northern circuit, he says. "I set out with too slender a provision of law, no doubt, and may very possibly never see a jury until I have to address it, my stock of practice being so slender that I never yet saw a *nisi prius* trial. But the points of law are few on a circuit, and by good fortune none of any difficulty may fall on me, and as there are no great wizards go the northern circuit, I may push through the thing with a little presence of mind and quickness." And no doubt he did "push through" in this way, as he "pushed through" both at Westminster and London, and on the circuit to the end, occupied with a variety of pursuits which no other man of his position at the Bar would have thought of undertaking.

Taking Brougham as a psychological study, it is difficult to say to what pursuit it would have been advisable for him to restrict himself, as most suitable to his powers. His early aptitude for physical science would seem to show that this was the field which was naturally most appropriate to his character of mind. But his oratorical tendencies at an equally early age, would lead us to question this view, especially taken in connection with the subsequent success which he attained as a speaker, both in Parliament and at the Bar. His bent in this direction was no doubt strong. Most of his articles in the *Edinburgh Review* are written speeches, and his speeches are never spoken essays. We can see at

once in his writings, from the collocation of his words and the rhythm of his sentences, as well as from the antagonistic qualities his various compositions display, that the author was an orator. There can, however, be no doubt that admirable as his powers as an orator were, greater concentration would have improved them, and given a higher finish to his efforts. * But here again he could accomplish what he did whilst occupied with a variety of pursuits which would have demanded the whole energies of ordinary men. We are aware that many of his speeches were prepared with much care, but the general impression which they give, is that rather of fervid eloquence than of finished oratory, and however great his success may have been, it was neither the highest that can be imagined, nor the highest of which he himself was capable.

There can be no doubt that Brougham derived great advantages from the circumstances of his early life. His family was connected by relationship or friendship with the Robertsons, the Clerks, the Erskines, and various other families of position and consideration in the northern metropolis. He was thus brought into contact from the first with many of the leading people in Edinburgh. Whatever he did in the way of speaking or writing was sure to be estimated at its full value, and ample scope was given to him for the exercise of the abilities he possessed, without the difficulties and hindrances which beset the path of one less favoured by circumstances. Again, when he came to London, the reputation he had acquired from his connection with the *Edinburgh Review* ensured his favourable reception by many distinguished members of the opposition, and he found himself a person of note from the time when he first crossed the Tweed. Of course if Brougham had not been a man of great ability, the advantages he enjoyed would never have enabled him to do what he did, and in any circumstances, even the most unfavourable, he would have been sure to distinguish himself. Only it may be reasonably doubted whether, with a mind such as his, he might not, with fewer advantages, have achieved a more solid success

than he actually obtained, and whether under different circumstances he might not have made more of the great abilities which he unquestionably possessed. .

The present volume throws little light on the early legal career of Lord Brougham, but it appears that in 1810, after having been nearly two years at the Bar, he consulted his friends as to the question whether he should "give up the profession of the law and take to politics, or attempt to combine the two." There was a third and more excellent way, which he does not seem to have taken into consideration, viz., to stick to the law, leaving politics to follow if they would. We cannot but think that the middle course which Brougham adopted, although the natural course for him to follow, was not a fortunate choice. If he had thrown himself into politics entirely, he would have remained in opposition for twenty years, but in the end he would have been one of the bright and shining lights of the world. He would have been compelled to fight for his position in a very different manner from what actually happened, and we certainly think he would have come out of the struggle "a wiser and a sadder man." On the other hand, if he had gone in for law, and resolved to know his profession thoroughly, he would have found enough to tax even all his great powers [to the uttermost. With such an intellect as his, he might have been one of the greatest of English lawyers. It was entirely in his power to become a Hardwicke or a Mansfield, or even something greater than either of them, by laying a proper foundation of full and accurate knowledge, and submitting his wonderful abilities to the full discipline of the law. By adopting the course he did, of making his profession a mere makeshift, the stepping-stone to political ambition, he lost a solid footing in either sphere.

It is amazing indeed to see the fascination which politics had for Brougham, and the readiness with which he hailed any proposal for bringing him into political office. Thus, early in 1811, when there was some prospect of the Whigs

coming into power, he writes to Earl Grey. "I need scarcely repeat my thanks to you for giving me the opportunity of '*serving under you*' in the supposed event." This was shortly before his defence of the Hunts, when he achieved so great a victory over the Crown in obtaining a verdict for the defendants. On this occasion Mr. J. A. Murray, afterwards a judge of the Court of Session, writes to him as follows:—"I think it a great victory for the public, for the prosecution of libels is carried too far, and it is a great object that it should be checked. You are the first person since Erskine who has done so, and you have now a much higher situation than any Ministry could give you." It would be an entire mistake, however, to suppose that Brougham desired office from any sordid views. He saw that the profession led to political importance only by a long and circuitous course, and he thought it desirable to take any nearer road that might present itself. It may be that if circumstances had been favourable at the time to his political advancement, it would have been better, but as matters turned out this divided allegiance was certainly unfortunate for his permanent reputation and usefulness. Having political objects in view, he never did justice to the law, and did not, therefore, achieve the results which were within his power; having the law to fall back upon, he never acquired that loyalty to party which is the primary condition of political success.

We have been much struck with the small space which Brougham's connection with the profession occupies in the present volume. It is something which, judging from what is here given, seems to have been entirely in the background of his thoughts. Before he left the Scotch Bar, he speaks of it as "this cursedest of cursed professions," and when he came to the English Bar, he seems to have had no idea of the intellectual glory which surrounds it. We are the more surprised at this, because we have always understood that in his later years he estimated these matters in a very different way. Those members of the Bar who knew him

during the last twenty years of his life, must have often heard him speak with the deepest interest of all that related to the profession. We cannot think, therefore, that the very meagre and imperfect information contained in the present volume with respect to his early professional career, is to be taken as a correct index of what his real feelings on the matter were. His change of residence from Edinburgh to London, when he left the Scotch Bar, is not even mentioned, and no allusion whatever is made to his studies, except to his never having seen a *nisi prius* trial, before entering on a pursuit for which even he must have felt that some real preparation was necessary. But perplexing as all this may be to members of the legal profession who regard Brougham as one of the great ornaments of the Bar, we may console ourselves by the reflection that others of his old friends have fared no better, and that his connection with the anti-slavery cause is touched on still more lightly. Here, too, we see how imperfect are these memoirs, and how inadequately they represent the real Henry Brougham as he was during the first decade of the present century.

But, however imperfect may be the information which this Autobiography gives of Brougham's early days, it leaves no doubt in the reader's mind as to the personal identity of the individual who is there dimly seen, and the energetic, large-souled, and intellectually-active veteran, whom many of us knew and admired. On few men had time and altered circumstances produced less change; and it was the common observation of those of his contemporaries who had known him from an early period, that his character and disposition were in all respects the same to the last as they had been at the first. The advice of his grandmother, that "distinction should be sought by just means," had always been the rule by which he walked. The course of life which he proposed for himself may not have been wisely chosen, and at times he may have acted imprudently in his public career, but even when he seemed to desert the cause which he had supported,

no one could say that he was actuated by any motives of a base or sordid character. Even when he found that he had lost the confidence of his former colleagues, he never tried to regain his position by unworthy compliances, but assuming a neutral position devoted himself to the judicial duties of a Law Lord, and to the support of measures of legal and social reform.

We have not thought it necessary to lay before our readers the contents of the present volume. With these the public are now familiar. We may mention, however, in addition to the account of the early life of Brougham, to which we have already alluded, the chapter on the Scotch Bar, and the *Edinburgh Review*, as forming the really interesting portion of the volume. Sketches of some of the great legal characters of Edinburgh at the beginning of the present century were given by Lord Brougham, more than thirty years ago in the *Edinburgh Review*.* Many of those, however, in the present volume are entirely new. That of Jeffrey is genial and true, without exaggeration, and perfectly just in stating the qualities of a man of the highest intellectual character, who was equally distinguished in literature and in law. We have to mention with regret the omission from this part of the memoir of any notice of Henry Cockburn, the biographer of Jeffrey, the contemporary of Brougham, the skilful advocate, the impressive speaker, the unswerving adherent to the cause of liberty and reform. The account of the establishment of the *Edinburgh Review* is interesting, but does not substantially differ from that given of the same matter by Sydney Smith, a man of a sound, practical mind, as well as of infinite humour, and deserving of higher praise than is here bestowed on him.

Notwithstanding the omissions and imperfections of the present volume, which we have been compelled to point out, we cannot deny that we have read it with very considerable interest. It leaves untold many things we should wish to

* *Edin. Rev.*, Vol. LXVIII.

be told, and tells many things we do not care to know, but still it gives us some notion of the early career of a man of great power and ardent temperament. It has no pretensions to the character of a regular autobiography, but it affords glimpses of a fiery soul "working out its way," which are valuable in themselves, and which could have been obtained by no other means. Even the conscientiousness of the executor in adhering scrupulously to the expressed wishes of the author of the work gives it a peculiar interest, apart from any merits it may possess. It is a consolation, however, to all the friends and admirers of the illustrious individual by whom it was left, to reflect that his fame will not depend on the "History of his Life and Times," written by himself, but on the work he did in his day and generation, the part which he bore in great political events, the reforms which he carried into effect, the speeches which he made on many memorable occasions, and the writings he produced on so many various subjects of permanent interest and importance.

ART. III.—LEGAL REPORTING AND JUDICIAL LEGISLATION.

WHAT is the best way of amending our system of legal reporting, is perhaps one of the most important and pressing legal questions of the day. Not only speculative philosophers, but practical lawyers have deemed it necessary to consider it; and some few years ago, after much discussion, a scheme was adopted by the profession, under which the yearly reports have been reduced to about eight octavo volumes, containing altogether about 6400 closely printed pages! The editors of these "Law Reports," have somewhat reduced the amount of matter, by attempting to exclude cases which only repeat well settled law; but other reports still exist and flourish, and record cases not to be found in the "Law Reports;" and the fact that they do so

shows that the famous Bar scheme is not a sufficient remedy for the evils complained of. Even if our annual reports were reduced to the 6400 pages of the "Law Reports," it would be quite clear that such an annual incubus as this requires to be lifted from the shoulders of the lawyer. But in the remarks which we propose to make on the nature, causes, and removal of the evils of the present system of law reporting, it will, we think, be made plain that the Bar scheme, and any scheme which merely deals with the manner of reporting and the careful editing of the reports, must leave the main evils of reporting untouched.

Many of these evils are of comparatively modern origin, or at least were formerly of much less magnitude than they now are. They owe their aggravation to changes in both our judicial system and the system of reporting. When the number of courts was small, and their work comparatively light, and when such reports as were published were the deliberate work of some of the best men at the Bar, exercising their judgment on what was worthy to be recorded, it was possible for the lawyer to master the principles of the law, and advise on novel points. Accordingly we read of a time when the learned serjeants were in the habit of resorting to some public place for the purpose of consulting with clients, and advising them off-hand.

But since then, the population, wealth, and commerce of the country have increased enormously, and so proportionally have increased the amount and complexity of the legal business to be brought before the lawyers and the courts. To meet this state of things, new courts have been erected, and the jurisdiction of the old has been extended, and a large portion of the decisions are reported, and, under the present system, are of more or less authority, and, what is the most serious matter, cannot be slighted or overlooked by a judge or lawyer in any other of the courts. It was indeed always very important that all the decisions of the various courts should be borne in mind. It may not be too much to say

that both the judges and counsel in Equity and in Common Law have sometimes fallen into grievous error from the difficulty, owing in part to the superabundance of reports, in gaining a sufficiently comprehensive knowledge of the law; and thus many a feeble anomaly has been authoritatively set up and worshipped in the courts. But however desirable formerly such comprehensive knowledge might have been, there can, we think, be no question of its importance or even necessity to both Bar and Bench now that the fusion of Law and Equity is not only in prospect, but has to some extent progressed. And without further remark it may be sufficient to say that most of the reported cases, wherever decided, disturb the peace of the practitioners in every branch of the law.

For a lawyer, then, to keep up with the law as he ought to do, is now, it is evident, almost impossible—especially if he be in large practice.

But to render the matter worse, it constantly happens that the facts of a case as finally proved (and this is peculiarly the case in Equity) only raise some question which has before been well settled; or, not unfrequently, because of the difficulty in ascertaining the law at present in the midst of the heap of reports, a party may designedly raise such point; and yet the reporter may deem it advisable to record the case in order to obviate any such difficulty in finding the law for the future, or, if he does not, a rival may report it, and so it will go to swell the mass of matter in which the really important decisions lie buried.

The evil has consequently reached such dimensions as to be now already overwhelming, and it must inevitably daily increase itself. As it is, many lawyers have abandoned the attempt to note up properly their text-books. Digests of cases are the only refuge, but they of course cannot come up to the current date, nor can they dispense with reference to the actual reports. Text-books themselves have become only digests of cases and not of the law. Something must be done.

But another evil added to and intensifying all those above enumerated, is that the principles of the law cannot be disentangled from the confused mass of conflicting reports daily showered upon us, if indeed any such principles are in many of them involved. Hence both judges and counsel are obliged too often to appeal helplessly to the last cases on the subject, instead of relying on sound scientific knowledge and vigorous common sense. And hence, further, there is an urgent demand for reports on the smallest details, and so again the evil, arising from the present arrangements, in the substance and administration of the law, intensifies and augments itself in geometric ratio. We hope to show this more in detail shortly. But as to the cause of this and the other evils above referred to, we think it will be found that they arise not so much from the manner of reporting as from the matter reported, and that the changes in the condition and duties of the courts have essentially changed the nature of the cases reported, so that even what would have been strictly proper reporting originally, no longer is so; and therefore there must be both some authoritative regulation as to the class of cases to be recorded and cited, as also some reduction in their number and a removal of redundancies.

In attempting to show this let us examine the place and office which decided cases ought, and that which they do, occupy in our law.

The greater part of the law of this country is judge-made law, that is, it consists of the interpretations which our judges have given to the Statutes upon the principles of Equity or Common Law, or it consists of their declarations of such principles independently of any Statute, and made as facts occurred calling for their application.

Now without entering upon the inquiry whether this should be so or not, the plea set up on its behalf is that it is the mere application of the principles of the law to the novel exigencies of society, and that it is for the benefit of the community that such applications should be taken as prece-

dents for the guidance of its judges in their decisions, and consequently of its members in their dealings. We have no code of principles, but they are supposed to lie in the breasts of the judges, and to be revealed by their applications.

The whole virtue, then, of judge-made law consists in its surely making known the principles of the law by their applications.

But as we have no authoritative means (such as there are in the case of an Act of Parliament) of evidencing and rapidly spreading a knowledge of this judge-made law, we are obliged to rely upon reporters for such ends. The records of the courts would only be clumsy, inconvenient, and imperfect means of informing the minds of even the judges themselves, and would be practically inaccessible to the great body of the lawyers and the public. Yet similar cases to those previously decided would be likely daily to arise, and it is important that the law should therefore be speedily known.

That is—Our reports should as speedily as possible make known the judge-made law.

If we, then, can show who, according to the theory of our English judicial system, are, or ought to be, our judicial law-makers, and that their decisions most surely make known the principles of the law by their applications, it is but a step to the conclusion that the speedy report of their decisions *alone* is what the community requires for its use.

We can afterwards examine the working of our existing arrangements to show that they neither speedily nor surely make known the law, and least of all do they bring out and illustrate its principles, whilst the alterations in the system of reporting lately attempted only tend to transfer the law-making power in part to the unauthorised revisers of the reports.

Who, then, ought to be the judicial law-makers?—Now it is manifest at once that if these law-makers are numerous and legislate independently, it will be as hopeless to look for uniformity and consistency in the law thus produced as to find a

multitude of watches really ticking and keeping time together. True, the law-makers all are bound by the same laws for their guides, but they must have different degrees of knowledge of these laws, and different conceptions of the principles wrapped up in them. On account of these differences, and also of the differences of natural temper and abilities, it is impossible but that, however slightly these persons may separate at first, the difference in principle from which the separation arises must, after it has been followed out, manifest itself as distinctly as the ultimate divergence in time shows there is no real synchronism in the beats of the watches.

It would not be strange, then, to find one court having such decided leanings on some matters as to very plainly affect the selection of the court before which the lawyers should put any case involving the determination of such matters; and to allow such court to lay down the law thereupon, as well as the courts from which it so differs, is of course utterly and irreconcilably to confuse the law and perplex society. But a single case will show the force of these observations. Suppose every one of the County Court judges were as able and learned as their lordships at Westminster Hall, what would be the chances of their laying down among them all in the course of their separate actions consistent enunciations and illustrations of the principles of the law?

Undoubtedly, then, our judicial law-makers should be as few as the exigencies of society and the press of business will allow.

It would be better for the consistency of the law, and its foundation in principle, that there should be a single fountain—indeed it is essential to the full attainment of these ends. This fountain should be the supreme tribunal of justice. But as this court could not discharge all the judicial law-making in so speedy or cheap a manner as to satisfy the wants of a country like this, and to meet the rapid changes in social and business arrangements in such a densely

packed, and highly artificial and progressive state of society, it is requisite that some of the lower courts should share in the function.—The problem is to settle to how many, and which, this share can be given, so as least to mar the consistency of the law, and yet develop its principles *pari passu* with the need of their application to novel circumstances.

It is evident that if the various Appellate Courts share in the function, we shall have chosen for the above-stated ends as few of the representatives of each branch of the legal administration as possible, and therefore shall have all attainable consistency in the law-making process.

And, on the other hand, because of our thus excluding the Primary Courts from any share in the law-making function, the principles of the law will be most surely developed and speedily applied as necessity may require. For:—the cases which come before the Appeal Courts will upon the whole be those about which there is most doubt—those cases, in fact, which lie on or near the margin of one or more principles of the law. By the decisions of such courts accordingly, the limits or boundaries of legal principles and their applications will be ascertained. Thus such principles will be most clearly marked out, and those cases which fall distinctly within them need not be particularly settled by authority.

Further, if access to such courts is thrown open at as small a cost, and as speedily, as the matter will admit, there will be a sufficiently frequent recourse to them to cause the difficulties arising from the changes in the community to be settled as expeditiously as their gravity will permit.

It is no doubt true that many cases are taken before the Appeal Courts, not because of any great doubts about the principles involved, but chiefly because the amount in contest is of great value, or the cases concern important interests. And certainly few cases can be appealed unless there are adequate funds to support the expense. But still in the majority of appeals, involving questions of law, the expense

would not be incurred unless there were real and substantial doubt as to the law, and if the course of appeal were facilitated, as it well might be, most of the cases where there was such real and substantial doubt as to the application of principles would be appealed; whilst most of the cases where the application of principles as decided by the inferior court at once commended itself to reason would go no further, and only a few such cases would, by reason of the wealth or litigiousness of the parties, or other exceptional circumstances, go up to the court above. Appeal cases where only facts are in dispute can be of no use to other litigants, and under no system ought to be reported.

It is contended, therefore, that appeal cases would, as a rule, settle the most doubtful applications of principles—viz., those lying on the margin. And we would again insist upon the point, that so to give or fix the outlines or boundaries of a legal principle and its applications is the clearest, and surest, and most speedy, way of making it known. By such means the minute details of its application are not, it is true, expressly judicially settled, but it will be the work of ordinary care and intelligence to ascertain what distinctly falls within its confines thus clearly marked out. And so the plan will do better than afford a direct decision on each minute detail, viz., prevent litigation on the details altogether. By giving, on the other hand, numberless examples of such application on the smallest matters, the inquirer will be left helpless to find out and apply the principles beyond the examples given, unless there be among them also those which fix and bring out the true reading and limits of such principles, in which case he will rely entirely for any novel use of it upon such latter examples alone. Nay, further, the very existence of so many examples of details will be apt to confuse the mind and lead it away from the principle of which it is in search. Moreover, a habit will be engendered of looking for and unreasoningly leaning on some particular case which may be exactly or nearly in point, instead of manfully

applying the principle by the help of reason and common sense; and thus often some small and immaterial accident will be seized hold of and magnified into a thing of essential importance, till by successive decisions some exceptional rule is established in the courts, and the difficulty of applying the law is then greatly increased. In fact, the existence of many recorded particular and minute illustrations of principles is not only surplusage but mischievous.

But besides the value which attaches to the decision of the Appeal Courts on account of the class of cases which come before them, there is the weight which belongs to them on account of the circumstances under which their judgments are arrived at, and the position of the court which delivers such judgments. Such cases have been at least twice argued, and the last time upon the very debatable point alone or nearly so. The Superior Court has the benefit of the judgment below to aid it; and it is expressly entrusted with its powers of review, because it is considered qualified to exercise them properly, and with the object of preserving uniformity and consistency in the law. The judgments of the Appeal Courts accordingly ought to, and do, carry greater weight than any other.

The problem above stated may therefore, it is submitted, be considered solved, by allowing the law-making authority to the several Appeal Courts. They will sufficiently, surely, and speedily settle the law on consistent principles, and the reports of their decisions will be all the practitioner will need to enable him to understand these principles, their limits, and application. The reports of the decisions of the inferior courts would be unnecessary and mischievous if allowed to be of authority. The Supreme Court of Appeal must necessarily be too hard to be reached to enable parties to take many cases before it, and would be unable to settle them all if so taken before it, and on these accounts could never be made the only law-making court.

We may add too that if by the ordinance of Appeal Courts

we distinctly render the decisions of the inferior courts not final, there appears to be a primary inconsistency in permitting any law-making power to the latter. That is, it seems impossible to consider as settled law the declared opinions of any court whose decisions are liable at any time to be expressly or impliedly overruled by the Superior Courts of Appeal; and it is difficult to understand what can be meant by doctrines of law which are not settled. If, however, one could conceive of law which is neither settled nor unsettled, but in a dubious or hesitating state, it may safely be said that it would, of all things that could be conceived, be the most ingeniously contrived to perplex society, promote litigation, and render doubtful its issue. No law, bad laws, anything—would be better than this, and better serve the purposes for which law is designed. This would not be to develop the principles of the law by applying them to novel circumstances, but to involve in doubt their scope and sphere of application which otherwise might be learned by study and reflection. These remarks no doubt apply also in some measure to the relationship between the Appellate Courts themselves and the Supreme Court. But, as we have tried to show, the difference lies here—that whereas the control of the Subordinate Appeal Courts over all questions lying on the boundaries of principles ought to be so frequently exercised as speedily to settle them, and over other matters of law is not needed if the principles are so well settled; the interference of the Supreme Court with its subordinates must necessarily be very infrequent and will little affect their authority, nor could such court fix such boundaries with sufficient speed. The inconsistency we have referred to is in the one case serious in its effects and need not be incurred; in the other case it is of trifling moment and must be submitted to.

Another merit of the plan of confining the law-making authority to the Appeal Courts would be that it would reduce within reasonable compass the collection of decisions from

which the law must be sought, and, by making the law more systematic and scientific, tend to render the lawyer more and more independent of current case law, and ultimately to abridge the number of appeal cases to be decided and recorded.

We urge, then, that the reports to be cited as authority should be confined to these Appeal Cases, because they would soonest, and most surely and clearly, make known the sound, consistent, and reliable judgment law, and relieve the public and profession from the present overwhelming mass of conflicting reports; and all this, without entrusting a judicial discretion in the way of revision to a reporter, but simply by trusting to that judicial machinery which was introduced for the purpose of settling the law with greater speed than the ultimate Court of Appeal, and with greater certainty and uniformity than the inferior courts would be able to do. This mode of ascertaining the law is most in accordance with our judicial system.

But the practice is very different. Not that the reports were always so ill suited to the ends for which they were designed as they are now. But that as our judicial system has been modified and enlarged, there has been no corresponding, although necessary, alteration in the practice of reporting on the class of cases to which authority has been allowed by the courts.

Formerly there were three Courts of Common Law and one Court of Chancery, each of which had a distinct jurisdiction. Though this state of things was gradually modified by legal fictions and otherwise, yet it substantially existed for a long time. And so long there was, therefore, by allowing the several primary courts to occupy the position of law-makers, little danger of inconsistency and confusion in the law laid down by them. No great objection could consequently be taken to the reports of their decisions being made and cited; and this the more, as the cases decided were comparatively few, and so were more fully argued and con-

sidered, and could be readily studied and compared by the lawyers and the Bench. Since that time, however, matters have materially changed. The jurisdictions of the three Courts of Common Law have been extended till they all entertain in the main the same class of cases; the number of the judges has been increased; and a Court of Error has been constituted to review all their decisions. New Courts of Equity have arisen, and now the Master of the Rolls and three Vice-Chancellors are occupied as judges of first instance in Equity; a new Court of Appeal in Chancery has been erected, and the Lord Chancellor is turned into a judge of appeal. The judicial functions of the Courts of Law and Equity also now somewhat overlap. Without going into other changes in and additions to the judicial system, it will be apparent that the courts of first instance are not now in a similar position to those formerly existing and especially, that the decisions of these new courts are far from possessing that degree of finality which those of the old courts had. The business of these courts is also greater, and their decisions more numerous, and the argument and the consideration of the cases necessarily not so thorough. And yet without any consideration having been called to the matter, or any legislative provision made in relation to it, the old plan of reporting and citing as authorities the decisions of all these courts has, notwithstanding the complete revolution in the judicial system, been continued, because it was once necessarily and properly adopted under far different circumstances. All we plead for is, some modification based upon a full consideration of the altered conditions of the subject matter; and we have ventured to inquire into the conditions of sound and sufficient judicial law-making in order to arrive at a satisfactory basis for regulating the class of cases which should be reported and cited in our courts. The plan we advocate would also have the merit, that it would be a self-adjustive one, and would at once accommodate itself to those changes in our judicial system which cannot long be deferred, and under which,

probably, the number of primary courts will be largely increased and the propriety of recording only the decisions of the appeal courts will become still more evident, because no otherwise will there be the slightest chance of our having any consistency or principle in the law.

Whether or not the course we have pointed out should be held to be the proper solution of this very difficult question, a little inquiry into the actual practise of our courts on the matter of case law will make it apparent that such practice is founded on no principle whatever, and is a frequent cause of the uncertainty and confusion of the law; and moreover, that it avoids none of the objections that may be urged against the course suggested, whilst it has none of the advantages of such a course.

It is somewhat difficult to indicate exactly what actual force the courts now allow to a case in whatever court decided. A late Lord Chancellor in a speech in the House of Lords said it was now impossible to say whether a case would be followed or not; and this we all know as a matter of daily experience. A learned writer says, that unless three Vice-Chancellors have concurred in any view of the law it would be unsafe to rely on it. Observations have often been made at Westminster to the effect that when the lower courts, or primary courts, have followed some original erroneous judgments of one of their number, nothing but the higher authority can get them out of the wrong groove and set the matter right. Further, even when the Appeal Court has spoken, it is not unusual to find some lower court dissatisfied with such decision, seeking out some immaterial accident in a case to differ it from the appeal case, and by riding off on such variation, avoiding the judgment of the higher court, and thus really elevating such accidental variation into the dignity of a matter of principle; and this the more especially it does if it can find an earlier case in its favour, agreeing in this variation with that before it. Then come probably a string

of cases in the lower courts following suit, though sometimes reluctantly, till the exception becomes well acknowledged, if not perhaps finally allowed. Next, the matter reappears before an Appeal Court; and then it may be that such Court may produce so formidable an array of *obiter dicta* and judicial doubts against the exception, that relying on its superior authority it may annul the exception; or it may be that the exception is confirmed—but it is impossible to foretell the result of such appeal. Sometimes exception after exception is introduced by the lower courts to some principle laid down of old or by the Appeal Courts; and without being confirmed by a string of subsequent decisions or by the superior courts, these exceptions are thus able to sap such principles, and when the subject matter again comes before the Appeal Court they must all be considered, and will often be taken by their number alone to have overruled the original doctrine. But perhaps one of the most curious cases is, when some decision of one of the inferior courts is rather unsatisfactory in point of reason. Then we may see some learned judge expressing great doubts about its soundness, and saying that if the matter were new, he should not be inclined to decide according to it, but yet holding it not so clearly unreasonable but that he ought to follow it. Another judge also expressing doubts about the original decision, is again unable, though fortified by the doubts of his predecessor, to consider himself authorised to reverse it, so weak are his doubts. And so of the next, and the next judge, till at last comes that bold court which terminates a diminishing series of doubts by unhesitatingly reversing the original decision and all that have followed it. Or we may find what is equally strange, that, notwithstanding its admitted unreasonableness, and notwithstanding also the institution of Appeal Courts for the express purpose of reviewing the judgments of the inferior courts, the jejune and hasty decision of one of such latter courts is allowed to rule all the other

courts of the land, and to embed some crude and indigested anomaly in our law. One other effect of the practice may be noticed, and that is, that the sort of authority attaching to the decision of an inferior court when not sufficient to settle the law, is often of force enough to fetter the judgment of another court of the same rank, on the same question, and thus to throw upon a litigant who may ultimately turn out to be in the right the risk of appealing, and frequently a part of the costs of litigation, which he would otherwise not have to bear.

Under such a system it is not possible to say in whom the law-making power is reposed, or when exactly anything may be taken for settled law; nor can it be said that the way in which something like settled law is arrived at, is calculated to develop and apply the principles of the law, or any principle at all. To add to the perplexities of those desirous of searching out the law, the vast mass of reports which the practice has already heaped, and is daily heaping, up must all of them be studied for such a purpose, whilst it is almost impossible to make sure that this has been exhaustively done, more especially as *obiter dicta* and judicial doubts may have been uttered in cases not very nearly connected with the subject under investigation. And hence also it may happen that some principle which is well settled in some old reports, and has deep roots and many fruits in the law, may be incidentally overlooked and overruled.

By these means has it come to pass that the judge-made law has tended more and more to become a mere disintegrated mass of legal facts, and consequently the Courts and Bar have inclined more and more to abstain from and discourage learned and logical discussion, and to rely upon the last case, wherever decided, or upon the balance of cases. As was lately said by Lord St. Leonards—"There is such a demand for the last authority, that now and then it is not the greatest lawyer, but the one who has read up the last cases, who proves the best advocate." And for these reasons, too, some

of the most successful counsel are those who, when advising their clients, utter Delphic oracles, which must lead to the opinion of the court being taken, if they do not directly recommend such course, or who utter a positive opinion, but abstain from giving their reasons, unless they find some case exactly in point. To argue a case upon principle, and advise accordingly, would be needlessly to risk their reputation on the cast of the judicial die, without any adequate compensation for the great labour involved in such process of investigation. But the other plan of advising they well know may safely be adopted in the present uncertain state of the law. We believe that such elaborate and closely reasoned opinions as distinguished former times, and not unfrequently helped to determine the law, are seldom delivered now.

This state of things is not creditable to our English jurisprudence. It disgusts those who seek for scientific accuracy or system in the law, and tends to degrade the profession of the law, from the position of a liberal profession into a mere money-getting, pettifogging trade, irksome but profitable. And as regards the public, it renders legal advice and litigation increasingly more necessary, and at the same time uncertain.

What defences, then, do the advocates of the present practice urge in its behalf? The main one we have heard is, that it tends to produce authoritative declarations of the law on the smallest details, and as soon as the changes in society demand them. Now, we have just seen how hard it is to determine in what degree, and at what times, the declarations may be deemed *authoritative*, and that, at any rate, it cannot be said that the law upon any point is now, *soon* definitively settled. Indeed, so far from the authority and expedition of the law-making process being increased, we have, we think, shown that even when the higher courts have spoken, their decisions are deprived of the finality which the grounds of their organisation demand. And as to there being judicial

decisions on as many, the smallest details of the law as possible, it is then apparent that, however much such decisions may prejudice and embarrass the systematic settlement of the law, to the lawyer their only use can be as guides for argument, which he may follow, without incurring blame, though not with safety for his client. The question remains, whether a system which would authoritatively mark out the boundaries of principles, and leave the lawyer to exercise his judgment and common sense in applying these principles to questions far within such boundaries, would not be of more service to him, and also to his client, than this practice, which does not develop principles, much less settle them, but only furnishes him with such blind and fallible guides on questions of detail. But if such guides are really of any use, there could be no reason why the decisions of the lower courts should not be reported and employed in that way, though not for citation as authorities in the courts. The advantage of this plan would be that such guides would constantly be laid aside and forgotten as the law-making decisions of the Appeal Courts finally settled the questions involved.

Further, we have shown that even if the decisions on details were all authoritative, yet that the very existence of reports of all such cases is a positive source of doubt; because where a case has to be considered to which they do not apply, they hide and bury in their midst the principles of the law on which such case should be decided; and because even in regard to a case to which they do expressly apply, it is almost impossible from the excessive number of such reports which must exist under any scheme of reporting hitherto planned, to know whether the authorities have been exhaustively searched. And the lawyer must then often be in the same position as if there were no details of the applications of principles furnished to him, whilst at the same time he is practically deprived of an authoritative collection of precedents enunciating and setting out the true

bearing and limits of principles in a consistent and scientific manner.

But as to the ground taken up by some, that to deprive the cases in the lower courts of the authority they now possess, would be to lower the dignity of such courts and render them careless in their conduct, we again reply that it is difficult to say what authority or power such cases really have now, except to confuse the law, deprive it of all claim to homogeneity and system, keep it long unsettled, increase the intolerable burden of reports, turn the lawyers into index-clerks, and finally work the greater evil of lowering the dignity of the Courts of Appeal by depriving *their* judgments, delivered after much consideration and full and repeated argument, of the position and weight which ought to belong to them. But we cannot admit that any judge would decide less carefully a matter between two suitors, or commit that worst of judicial errors—prejudge a case—because his decision would have no authority as a precedent. He might deliver a less elaborate judgment; but that which, independently of his sense of duty, now keeps him and would keep him straight, is the watchful presence of a body of skilled lawyers. Still, if such motives should in any case be insufficient to check a disposition to hastiness or to stimulate a wearied mind, the knowledge that under a new system, such as ought to exist, there might be a cheap and easy appeal, would suffice to do so. This should be the check on which reliance should be placed. To such check would be added that of the practice of reporting for guides (though not as authorities) the judge's decisions. And it must further be considered how much lighter and more agreeable would become the work of a judge under the system we propose, if, as we think, it would tend to classify and reduce to system the enunciations of the law, and to diminish the number of cases to be balanced and assigned their proper weight and authority. A main cause of weariness, and of consequent impatience and haste, would thus be removed.

There is one sort of cases upon which many will lay great stress, even though decided in the lower courts. These are what are called *Practice cases*. Many of these cases really involve considerations which affect the fair trial of the legal rights of the parties, and ought to be settled as other questions of law should be. Others, it must be admitted, relate to matters only of arbitrary regulation, and it may be deemed unimportant by what authority they are settled so that they are expressly fixed. But if we are to have the same rules for all the courts having the same jurisdiction, it surely is best that the court which controls them all should be the one to finally arrange the rules. If it were possible to draw a sharp line of distinction between the mere practice cases, and others, there could be little objection to allowing the former to have the authority they now have. This, however, cannot be done, and there must consequently be the same lawgiving source for all cases of authority. Nor, surely, could much inconvenience arise from any delay in the enactment of these arbitrary rules of practice. All such rules as may be of real importance must be laid down by the Legislature and the Orders of Court after due consideration, and the less there are of other rules the better. A multitude of regulations not framed for the purpose of giving the parties full opportunities of bringing their cases before the court, and of preventing unreasonable delay and prolixity, are mere pitfalls and traps, calculated to defeat justice and to favour fraud. A sort of standing commission, charged to watch the practice, and revise it authoritatively at short intervals, would seem to be the machinery really required.

It only remains to show that it would be possible by any enactment to prevent the counsel and judges from citing and relying on the decisions of the lower courts. It will be urged that the judges of the inferior courts will be sure to remember their own previously expressed opinions, or the cases in which they themselves were engaged, or which they observed when at the Bar. And it will also be said that

counsel will merely fall into the habit of quoting as guides, and by way of argument, such decisions, especially if reported, and that when so quoted or used, they will inevitably have more than the mere weight of their intrinsic propriety and reasonableness. It would be hard to deny all this. But yet it would not bring us back to our present lamentable condition. For, in the first place, it would not give such decisions that authority which now renders it necessary for the courts to resort to all manner of unworthy devices for evading them, or throw upon the Appeal Courts the painful responsibility of directly overruling them. In the next place, it would depend upon the estimation in which the higher courts might hold the legitimate dignity to which they had been properly restored, and upon the responsibility which they might feel in respect of the law-making function with which they were entrusted, whether they would allow themselves to be virtually again deposed and degraded by the citation of the cases from the inferior courts in any other way than as containing arguments worthy of consideration. And if such higher courts should at first steadily show a resolution to carry out the intentions of the Legislature, the reasoning of those cases would inevitably be all the value they would possess in the courts below, and would stand on the same footing as arguments deduced from any other source. And further, as it cannot be doubted that the Appeal Courts would not allow any cases to be cited against their own final decisions when once they had laid down the law, the citation and reference to anything but their decisions must at once end. This would render for all purposes unnecessary any search after, or the perusal or quoting of everything prior to such decisions, and would relieve the lawyer from labour and the law from uncertainty. As to the recollections of the judges, these must likewise cease to have effect at the same time and for the same reasons.

Before leaving the subject we would again urge the gigantic proportions of the evil under which the present

system now causes the profession and the public to suffer :—

That it does not arise from the numbers of the cases recorded, or the mode of reporting alone, and therefore any amendment in such matters would only remove the mischief for a time and to a very limited degree, whilst the increase of legal business, which must also soon increase the number of courts, will speedily render the mass of reports as cumbersome and voluminous as ever.

But that the origin of the evil is to be traced also and principally to the present practice as to judicial law-making, and affects the very substance and structure of the law ; and therefore no reform can be of much value or service which is not based on some regulating of the law-making process.

That probably if such reform were effected the number of reports would be most surely and largely reduced. And that then no very great inconvenience would arise from leaving the present *mode* of reporting untouched, because it would require no great learning or judicial discretion in the reporter to avoid recording cases in which only facts were in dispute ; whilst all the undoubted merits of the system would be continued, and so the very difficult problem of finding a substitute would not need to be solved.

To this may be added another merit, that the decisions of the Appeal Courts would yearly tend more and more to systematise the law and bring out its true principles, and that after full and repeated argument and consideration. And thus the yearly volume of reports would contain in small compass an instalment of, perhaps, the best digest or code of the old law that could be devised, with the aptest and most useful illustrations showing the limits of principles, all conflict and confusion of cases being removed on the highest authority, and after exhaustive investigation ; such full argument, investigation, and consideration becoming possible, it is to be observed, when the court and counsel were delivered from the present burden of reports of cases

in the courts below. This burden being removed, text-writers also could, and soon would, come to the fore with works of a higher character (the outcome of professional zeal, and not the mere product of official labour), and furnish the profession with any further assistance requisite. And then there would be no necessity for that much-talked-of Government Digest, or Code, which does not seem likely to come, if at all, till the present generation of lawyers has passed away, and which, if it should come, will (unlike the sort of digest suggested above) be almost a generation behind the law; but the money proposed to be devoted to such object might be more fitly applied to any compensation proper for the present reporters.

A further reform seems very desirable in regard to Equity cases at least. Every one knows that judges in Equity are judges of the facts, as well as of the law. Hence, Equity reports are almost as full of the verdicts of the courts on matters of fact, as of their decisions on matters of law. Such verdicts ought not to be reported. Matters of fact should be determined by the commonsense of the judge unfettered by precedents, in the same way as a jury now decides. If the judge were himself to draw the distinction in his judgment between his findings of fact and his judgment of the law, the difficulty would be in great part removed. Much of the embarrassment in interpreting wills arises from the cloud of cases deciding what, as a matter of fact, a testator meant by certain terms used by him.

Finally, it is to be observed that there is no *state of things* which we may, at our leisure, consider of amending, for the mischief is not stationary, but alarmingly progressive and reproductive. Whether it is to be allowed to work its own way to some revolutionary result, or taken in hand and cured whilst there is opportunity by a temperate reform, based on sound principles of jurisprudence, is really the only thing to be determined.

ART. IV.—THE LAW OF FIXTURES; ITS HISTORICAL DEVELOPMENT AND PRESENT STATE. Part I. *By* ARCHIBALD BROWN, of the Middle Temple, Barrister-at-Law.

IT has been said of history that it finds its entablature in law; it may conversely be said of law that it finds its explanation in history. Hence arises the necessity for lawyers in interpreting the laws of any period to regard them in the light of the contemporary history; for so only are we able to intelligently judge of their consistency or inconsistency with the laws of the preceding and succeeding periods. The law of fixtures, the subject of this article, is more especially obnoxious to this necessity or rule, inasmuch as from its primary relation to the freehold of land, it has had to undergo, and has undergone, corresponding variations with each successive variation of its principal or relative. And just as those latter variations have been mainly occasioned by considerations of modern equity breaking in upon the rigour of the olden law, so also have the former variations been for the most part occasioned by like equitable reasons. The very name of "fixtures" affords in itself in the ambiguity, or rather the inversion, of its meaning, a perpetual memorial of the extent of the effects of this equitable interference; for while it doubtless originally connoted that sort of positive fixation and positive annexation which the etymology of it suggests, yet it now connotes the altogether negative and opposite conception of "the right to *unfix* or to *remove*" (*See Hallen v. Runder infra*). Moreover the infrequency in early times, and the frequency in these and in more recent days of disputes regarding fixtures, afford a further evidence or proof of the extent of these modern modifications of the law; as does also the scantiness,

or rather the almost total want of allusion to fixtures in the early records and memorials of our law.

This scantiness of allusion is, indeed, at first sight remarkable. Thus, the word *fixtures* does not so much as once occur either in the abridgment of Bacon or in that of Viner as a substantive head of law; nor is it mentioned among the "Termes de la Ley." It occurs, indeed, in Comyn's Digest, but in the addenda only, and not in the principal body of that work. In the Year Books it is as infrequent, nor do the smaller compendiums, digests, and abridgments of our early law present the name in any greater prominence or frequency. It is true, indeed, that the substance of the law of fixtures is found in all those early records, but then the materials of it there given are not only scanty in their amount, but are also stowed away among the subordinate divisions of other and seemingly unconnected heads of law. Thus, in the abridgment of Bacon, we find the following somewhat obscure allusion to them under the head of "Executors and Administrators":—

"(H) What shall be deemed the testator's personal estate or assets in the hands of the executor; and herein—(1.) (2.) (3.) What shall be deemed his personal estate; and therein what things shall go to the heir, and not to the executor."

And again we find numerous matters entered under the head of "Waste or Wast," which, we at first sight imagine, might as correctly have been entered under the head of "Fixtures;" and yet they nowhere appear under this latter head. The precise relation indeed of *fixtures* to *waste* in early and in more recent times is an interesting subject to investigate, and is a matter not altogether easy to define. It appears, however, speaking generally, that the law of waste, as being the earlier law, included within it in early times the law of fixtures, regarded at least from the landlord's point of view; and this aspect of the law of fixtures having been originally the only aspect of it, it would follow that

the law of fixtures and the law of waste were originally identical. But the law of fixtures in its predominant modern aspect is the law of the tenant more than of the landlord, and as such it is unknown to the early law, and is therefore specifically a different law from that of waste.

The comparatively late origin of the law of fixtures in the modern conception of it seems, however, to admit of explanation. If we call to mind the peculiarity of the relation subsisting in old times between the lessor and his lessee—a relation in which *status* was everything, and in which *contract* had neither place nor part; where the tenant had no civil existence independently of, or as against his lord, but was (so far as regarded his tenancy at least) the mere bailiff or agent of his lord; we shall readily understand, I think, that in such a relation the maxim of *accessio cedit principali* found unobstructed operation. From this maxim, which in its special application to land assumed in the civil law the form of “*Solo cedit, quod solo inaedificatur*,” and in our own law the form of “*Quidquid plantatur solo, solo cedit*,” it followed in virtue of the relation aforesaid subsisting between landlord and tenant, that everything of whatever sort put up upon or put into the soil by the tenant straightway became part and parcel of the soil, and the tenant had no right, even during his term, to remove or to unfix it again. It was, in fact, the landlord’s fixture from the first, and the tenant had neither any property in it, nor any right to, or power over, it in this the earliest phasis of the agricultural relation. So long, therefore, as this phasis of that relation continued, there was neither occasion nor opportunity for the question of fixtures to spring up as between landlord and tenant. It was only and could only be from the time that the tenant acquired a certain personal freedom or individual independence that the question in this aspect of it could arise; for fixtures as we have seen is a word which peculiarly regards the tenant as waste does the lord. And although it is true that a man who was the villein of one lord might be the tenant of some other person to whom he stood in

no relation of villenage, still as he occupied a position which was customarily assigned to the villein, although his personal rights were unabated, his rights in respect of his tenancy doubtless suffered depression from the analogy of the villein's condition; and beyond all doubt those latter rights were most difficult if they were not impossible to assert, for where was the law which recognised them, or the legal machinery which enforced and supported them?

Now it is matter of history that this primitive relation subsisted in all its unmitigated rudeness for a period that was sufficient to allow the full development and solidification of the law of agricultural fixtures purely and simply so called, that is to say, of erections and other things which were indispensable to the bare or necessary enjoyment or culture of the land as such. The primitive rigour of this branch of the law of fixtures admits therefore of the simplest explanation; and the continuance of that rigour down to the present times admits of as ready a one. Its continuance is in fact a result of the operation of that maxim of our law which is expressed by the phrase "*Æquitas sequitur legem*," whereby equity is rendered powerless to check the operation or to remedy the effects of a law which has been once definitely and clearly formed, and declared. But indeed the villein or anti-villanus had little (if he had any) equitable ground of complaint: "*Nam scienti alienum esse solum, potest culpa objici, quod temerè aedificaverit in eo solo, quod intelligenet alienum esse*" (Inst. II., 1., 30).

It appears to have been in the reign of Edward I. that the villein or pro-villein class first rose to importance, and accordingly we find, in the reign of Edward II., his immediate successor, the first trace of a contention between a landlord and his tenant, respecting the claim of the latter to take down certain agricultural erections put up by himself upon his farm. Thus we read in the Year Book (I., 518), that in the 17 Edward II., a person who was the lessee of land built a house upon the land, and afterwards pulled it down, and was adjudged guilty of waste for so doing. Lord Coke, in appa-

rent reference to this case, remarks (Co. Litt., 53a), that there was waste in the building of the house, and also new or further waste in afterwards suffering it to waste. This decision, which is the first of the reported decisions upon the matter, probably checked for a time the enterprise of the villein improver; but that enterprise soon discovered other contrivances whereby to elude or to defeat the landlord's right. These contrivances we shall consider hereafter, for the present we must follow up the effect of the decision itself. It appears, then, that the decision was thoroughly effective, and even final, upon the particular state of matters in respect of which it was pronounced, for although we do indeed find a considerable number of cases, both early and recent (being the cases hereinafter in that relation mentioned), upon matters more or less resembling this particular state of matters, yet we do not find any other instance of a dispute regarding the identical state of matters, until so recent a date as the beginning of the present century, when the same question was again raised, and apparently in a wilful or intentional manner, in the great case of *Elwes v. Maw* (3 East, 33), decided by Lord Ellenborough in 1803. The inducement for bringing this case forward at all at the time appears, as well from the arguments of counsel as from the judgment delivered in it, to have been the hope of being able, upon the strength of the (as we shall see) admitted liberality of the law of fixtures in matters other than the strictly agricultural, to extend the like liberality to the strictly agricultural fixtures also, and thereby to dissipate and to dispel by one decision, conceived in the modern spirit, the rigour of a law which had descended without mitigation from the olden times. But the endeavour failed of its object, and the old rigour of the law of agricultural fixtures—where those fixtures were buildings let into the ground—survived then, as it still survives, the noble and learned judge having decided, after an examination of all the cases, that “no adjudged case had yet gone the length of establishing that buildings subservient

to the purposes of agriculture, as distinguished from those of trade, were removable by the tenant himself who built them during his term."

The cases to which we alluded on a previous page as having arisen upon matters more or less resembling the state of matters exemplified in the 17 Edward II., and in *Elwes v. Mawe*, are chiefly the following:—In the 24 Eliz. in *Cooke's case* (Moore, 177), one *Cooke* brought an action of waste against one *Humphrey*, and for waste assigned (*inter alia*) the distraint of two doors with their cheek posts. *Humphrey* pleaded the erection of the said doors and posts by himself after the commencement of his tenancy, and their removal at the expiration of it, and upon demurrer the justices held that *Humphrey's* defence was no plea, Mr. Justice *Pirryam* stating as follows: "When the lessee takes glass windows or doors which were already in the house at the time of the granting of the lease, such taking is waste; moreover, if the lessee annexes anything to the frank tenement and afterwards takes it, such taking also is waste. Now some doors are a defence to the frank tenement as outer doors, while others are less in the nature of necessities, for example, the inner doors which separate the apartments within the house. It seems, therefore, that a lessee who erects the posts for outer doors, and slings the doors upon them, cannot afterwards remove the doors during his term; but it is otherwise with inner doors." Again, in the 41 Eliz., in the case of *Warner v. Fleetwood*, quoted by Lord Coke at the conclusion of his report of *Herlakenden's case* (4 Rep., 64a), it was resolved *per totam curiam* that glass annexed to windows by nails, or in other manner, by the lessor or by the lessee, could not be removed by the lessee, for without glass it was *no perfect house*; and by lease or grant of the house it should pass as parcel thereof, and that the heir should have it, and not the executors; and it was likewise then resolved that wainscot, were it annexed to the house by the lessor or by the lessee, was parcel of the house; and that there was no difference in

law if it be fastened by great nails or by little nails, or by screws, or by irons put through the post or walls (as have been invented of late time), but if the wainscot is by any of the said ways, or by any other way, fastened to the posts or walls of the house, the lessee cannot remove it, but he is punishable in an action of waste, for it is parcel of the house; and so by the lease or grant of the house (in the same manner as the ceiling or plaistering of the house), it shall pass as parcel of it.

There is also a case of *Darcey v. Askwith* (15 Jac. I.), reported by Hobart (234), which is more important for the dicta which it contains than for the decision which was given in it. The principal of those dicta may be said to be the following:—

“It is generally true that the lessee hath no power to alter the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture. . . . A lessee may build a house where none was before, but that must be every way at his own charge. . . . And if he keep it not in repair, an action of waste lies.”

Such having been the rigour of the early law, and that rigour having survived, as we have seen, to the present day in respect of all those strictly agricultural erections, and the necessary completions thereof, which would have fallen in old times, and which do, therefore, now also fall within the scope of the old law, the tenant's only safety, in putting up strictly agricultural buildings that are to be actually let into the soil, or any of the necessary completions thereof, is one or other of the two following courses; namely, either (1.) To enter into such stipulations, or into such an agreement, with his landlord at the commencement of his tenancy regarding the cost of the erections, or regarding the subsequent continuance of his tenancy or otherwise, as his own practical wisdom may suggest; and failing such stipulations or such an agreement, then, (2.) To obtain from the landlord some

indication or expression of his consent to the buildings being erected. In the one case he will secure to himself a remedy upon the special stipulations or agreement; in the other case he will be able to proceed under the Statute of 14 & 15 Vict. c. 25, which, in its third section, enacts as follows:—

“That if any tenant of a farm or lands shall, after the passing of this Act, with the consent in writing of the landlord for the time being, at his own cost and expense, erect any farm building, either detached or otherwise, or put up any building, engine, or machinery, either for agricultural purposes, or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him, notwithstanding the same may consist of separate buildings, or that the same, or any part thereof, may be built in, or permanently fixed to, the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition as the same were in before the erection of anything so removed; provided, nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid, without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord, who shall have so elected to purchase the same.”

But besides buildings fixed into the soil, it is evident that other buildings might be erected which should either rest upon without being fixed into the soil, or which should not even rest upon the soil but upon some substructure in the

soil expressly prepared to receive them; and it was in resorting to this latter species of erections that the villein enterprise or sagacity, to which we have alluded, principally displayed itself. The case of *Culling v. Tuffnall* (Bul. N. P., 34) is a good illustration of this latter class of agricultural buildings. It was the case of a *barn* raised upon "patens and blocks of timber lying upon the ground, but not fixed in or to the ground." Treby (L. C. J.), who tried the case at Hereford in 1694, declared the barn to be removable by the tenant who had erected it. The ground of his lordship's opinion is stated in the report to have been *a custom* in that part of the country of erecting barns in the manner described, with a view to carrying them away again at the end of the term. Mr. Justice Buller however remarks of this case, that although the Lord Chief Justice thought proper to rest it upon the custom of the country, he (Mr. Justice Buller) apprehended that it would now be determined in favour of the tenant without any difficulty; "for of late years," he says, "many things are allowed to be removable by tenants which would not have been permitted formerly." And Lord Ellenborough remarks of this case in the leading case of *Elwes v. Mawe* before cited—"To be sure the tenant might (take them away at the end of his term), and that without any custom; for the terms of the statement exclude them from being considered fixtures: 'They were not fixed in or to the ground.'" It appears to us, if we may hazard an opinion in the case, that Mr. Justice Buller's explanation is preferable to that of Lord Ellenborough; for we think that the latter explanation would not alone have been sufficient to account for the original removability. For it has appeared in the previous part of this article, that the law of agricultural erections, being those erections which were (as indeed all the original agricultural erections were) *barely necessary* to the enjoyment of the land, or to the performance of the ordinary farm routine, was of a grasp sufficiently rigorous and comprehensive to embrace in the earliest times

even such agricultural erections as the barn in question, which were either not fixed in the ground at all or were but slightly fixed in it. And it wanted therefore the growth and counteracting influence of a contrary custom to relax the illiberality of the rule; it is however true that, by the year 1803, and indeed long before it, that silent pertinacity, which is the soul of liberty, had established a universal custom of removing fixtures even although strictly agricultural which were constructed in the manner of the barn; and the fault of Lord Ellenborough's criticism upon the case is not that it is erroneous in the substance, but that it is unlearned in the reason, of it. There does not appear, with the one remarkable exception of *Wansboro' v. Muton*, hereinafter set forth, to have been any other decision upon a state of matters which was in all respects like to the state of matters presented in the *Barn case* of *Culling v. Tuffnall*; and it may be assumed therefore that that case also settled the law in this particular respect upon its definitive and final basis.

We shall find, indeed, in the second or following division of our subject numerous resembling cases of like erections, which were held to be removable by the tenant who had erected them; but we shall there also find that the ground upon which this removability was declared was something entirely unconnected with agriculture. And we may therefore regard this first division of our subject, the purely agricultural part of it, as completed.

Before leaving it, however, it is desirable to extract from it the principle which it is so well calculated to give, and which must be our guiding principle throughout all the rest of this investigation. We have seen how it was that by the most natural of all processes the early agricultural erections instantly and invariably became part and parcel of the soil upon which or in which they were set up. This ready union of the fixtures with the soil may be resembled to the union or commixture of two objects which have a

chemical affinity for each other; it was something altogether different at least from that merely mechanical union which is created or produced by the juxtaposition of two non-resembling bodies. Now it is extremely important to attend to the nature of this quasi-chemical union between the soil and the fixtures. For if it be possible to find a like quasi-chemical affinity to exist between any other *res principalis* and its particular fixture or appendage, then it would only be consistent in such a case to hold that there also a quasi-chemical union either has arisen or ought to arise between the two objects, in the absence at least of any countervailing equitable considerations. It becomes therefore in all cases a preliminary, and indeed indispensable, step in determining whether and by whom a particular fixture is removable, to first ascertain the proper or distinctive character of the *res principalis* itself. Thus the inheritance in general consists of land purely and simply so called, and the fixtures which would in such a case present an inherent affinity to it would be those only which are strictly agricultural. Sometimes, however, and more frequently perhaps than not in these modern days, the inheritance consists of land *plus* some particular character of as permanent a nature as the land itself.

Now, in this latter case, the particular fixtures which would have an affinity for the inheritance would be those objects or things which were themselves also in some essential manner possessed of that character, in other words, which were peculiarly or directly subservient to the enjoyment of the land in that its seemingly adventitious yet permanently acquired and natural character. The principle for which we are at present contending finds its illustration and expression in the *Salt Pans* case of *Lawton v. Salmon* (1 H. Bl., 259 n). In that case the inheritance consisted of *Salt-works*, and the fixtures which were the subject of dispute were the *salt pans* used in the works, two things between which there was an evident correspondence and affinity, or similarity of mutual adaptation.

The case presented no circumstances of peculiarity giving rise to any equity as between the parties, so that the simple and unbiassed question to determine was this, whether the *quality of the inheritance* should or should not determine the quality of the fixtures also, that is to say, should determine whether these fixtures were irremovable, as forming part and parcel of the inheritance; for it was admitted that the salt-pans were, as a matter of fact, removable, and that too without damage either to themselves in the removal or to the building in which they were placed. Lord Mansfield, the judge who determined the case, recognised the importance of our principle of regarding the quality of the inheritance as the primary consideration in determining the quality of the fixtures, and after briefly stating the then law of fixtures in the ordinary applications of it, said as follows:—

“The present case is very strong. The salt-spring is a valuable inheritance, but no profit arises from it unless there is a salt-work, which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials. On the reason of the thing therefore, and the intention of the testator, they must go to the heir.”

The reader will, doubtless, have observed from the quotation given above, that Lord Mansfield regarded the spring or the ground out of which it issued as being in itself the inheritance, and that he included the salt pans and the salt-works in the same catalogue of accessories to the principal thing or the inheritance; it might, however, be submitted, that at the time of the erection of the salt pans the salt-works were already part of the inheritance (see Report of case), and that the pans therefore went with the works

plus the spring, and not that the works *plus* the pans went with the spring; although indeed if Lord Mansfield's view is to hold even in this particular matter—a matter upon which his lordship would probably not have insisted, then our view of the case is strengthened all the more, as the salt pans would in such case be in a double degree the accessory of the *res principalis*.

This principle of ours was also afterwards recognised and proceeded upon by Lord Brougham in his elaborate judgment in the case of *Fisher v. Dixon* (12 Cl. & Fin., 312), where, after expressing his disapproval of the *Cider Mill case* (cited in *Lawton v. Lawton*, 3 Atk., 13), or rather the want of sufficient data to judge of the correctness of the decision which was given in it, he continued, with some slight inaccuracies, as follows:—

“If a cider mill be fixed to the soil, though it is a manufactory and erected for the purpose of a manufactory, yet if it is really *solo infixum*, it is perfectly immaterial whether it be for the purpose of a manufactory, or of a granary, or of a barn, or of anything else. It is a fixture on the soil, and it becomes part of the soil. Can any man say, that one of the great brew-houses would belong to the executor, because it is erected for the purpose of a manufacture which is wholly unconnected with the land? . . . It has nothing to do with the land, as may be seen by those who will take the trouble of looking at any of the brew-houses in London, which are established in places where it would be very difficult to find a blade of grass, much less a crop of barley, of which to make malt. But although it is a manufactory, . . . it would go unquestionably to the heir.”

The principle was also followed in *D'Eyncourt v. Gregory* (3 L. R. Eq., 382), decided in 1866 by Lord Romilly (M.R.) In this case, which was a case of the replacement of the old mansion upon certain settled estates by a new mansion, both larger in dimensions and more costly and magnificent in its fittings up, his lordship, after making certain pre-

liminary statements and remarks, spoke of the internal fittings up of the new mansion as follows:—

“Both the painting and the tapestries could unquestionably be removed in this sense, that they could be taken down, and the place be either left open or be filled with satin; so likewise the satin in the frames could be taken down, and the gaps replaced by paper; and doubtless the paper, being stuck close to the wall, could not be removed. But, in my opinion, in all these cases, whether it be paper, or satin (or panels), or tapestry, they are all part of the wall itself, and they are fixtures not to be removed. In all these cases, the question is not whether the thing itself is easily removable, but whether it is essentially a part of the building itself from which it is proposed to remove it, as in the familiar instance of the grinding-stone * of a flour-mill, which is easily removable, but which is nevertheless a part of the mill itself, and goes to the heir. . . . With respect to the carved kneeling figures on the staircase in the great hall, and the sculptured marble vases in the hall, they appear to me to come within the category of articles that cannot be removed. I think it does not depend on whether any cement is used for fixing these articles, or whether they rest by their own weight, but upon this—whether they are strictly and properly part of the architectural design for the hall and staircase itself. . . . They resemble the stone of a mill, which is part of the mill itself, and goes to the heir-at-law.”

Our principle would probably explain even the case of the *Cider mill* itself (quoted *supra*), upon which so many criticisms have been passed, and explain it moreover independently of the custom upon which Lord Hardwicke in *Atkyns* inclined to rest it; it would explain it, for instance, if we might assume that the inheritance which was the *res principalis* in the case was not purely and simply, or permanently, a cider manufactory, but was land primarily and mainly, and in fact almost exclusively, adapted for and devoted to agricultural purposes; and that the mill itself had an entire or individual existence after its removal. At all events our

* See *Wystow's case* cited in *Place v. Fagg*, 4 Man. & Ry., 777.

principle had been recognised at the date of the cider mill and for a long time before it. Thus we occasionally find it expressed in the cases given in the Year Books, and we more frequently detect it underlying those cases: and indeed it explains certain points in them which, but for the explanation it affords, would be contrariant to the more modern views. For example, in the 20 Hen. VII. (7 Year Book, 13, 24), in an action of trespass brought by an heir against the executor of his ancestor for the alleged tortious removal by the latter of a furnace which had been fastened with mortar to the frank tenement, we find that the Court of Common Pleas declared the removal to have been tortious for the reasons which follow, namely:—

“Those things which can neither be forfeited on outlawry in a personal action, nor be taken in execution, nor be distrained for rent, such things the executors shall not have; but a furnace, or a table fixed with posts in the floor, or a wainscot, or border fastened to the frank tenement, also doors, windows, and other such things as are annexed to the frank tenement, and made ‘*pur un profit del inheritance*,’ can neither be forfeited on outlawry, nor be taken in distress. . . . But if they are removable, then are they not part or parcel of the frank tenement.”

And again in the 21 Hen. VII., in a like action between like parties, and for a like alleged tortious removal, we find the judges giving the following opinions, namely—

Mr. J. Pollard was of opinion that the action would lie, for (as he remarked)—

“Such things as are fixed or fastened to the frank tenement will descend to the heir along with the inheritance, and moreover they will pass by feoffment with the frank tenement, *e.g.*, where vats are fixed in the ground, whether in a brew-house or in a dye-house, they are appurtenances to the frank tenement, and are altered from the condition of chattels.”

Mr. J. Kingsmill remarked—

“After it is fixed to the frank tenement, it is incident to, if it is

not also parcel of, the frank tenement; and it will in all cases go with the frank tenement. . . . And when a person fixes vats in brew-houses or in dye-houses, and then deceases, his heir shall have the vats; for immediately upon their fixation they are for the continual profit of the house, and it is therefore more reasonable that the heir should have them (he having also the frank tenement to which they are fixed), than that the executors should have them (they having nothing whatever to do with the frank tenement)."

It is the same principle which also explains that frequently quoted passage in the Touchstone (pp. 469, 470), where it is said that an executor "shall not have the *incidents of a house*, as glass, doors, wainscot, and the like, no more than the house itself." Nor is the principle affected, or, if affected at all, it is only affected to be confirmed by the passage in the Office of Executors (p. 53), which says that if the testator has only a term of years in the premises, and die before the term is expired, then his executor will succeed to his interest in the land, and also and in virtue thereof to his interest in the fixtures (decr, &c.) which belong to the land. And the principle is indeed generally recognised as having its foundation in reason and in good common sense.

This principle being established and the first branch of our subject having been completed, we proceed to the second branch or division of it, which is—the tenant's right to unfix or to remove fixtures other than strictly agricultural ones, which either rest upon the ground, or other *res principalis*, without being fixed in it, or which, if fixed in the ground, or other the *res principalis*, are so fixed in it as not to be finally or indefeasibly incorporated with or annexed to it in contemplation of law, and which therefore retain their individual entirety, both while they are fixtures and afterwards when they are severed. It is evident that this branch or division of our subject is much more complex in the matters which are the subject of it than is our first division; and we might therefore *prima facie* expect that the rule

which is to express the law of fixtures in this case would be correspondingly more various or complex. And yet that law is not incapable either of brief exposition or of simple and clear expression.

First it appears that this second division is apparently threefold, as embracing three apparently separate or distinct heads or classes of fixtures, namely, (1.) Mixed Agricultural; (2.) Trade Proper; and (3.) Domestic or Ornamental.

With reference first to the Mixed Agricultural Fixtures of this division, they are to be distinguished of course from the purely agricultural ones, such as the *barn* in *Culling v. Tuffnall*, which has already been stated and criticised, and such as the *buildings let into the ground* and the *necessary completions to buildings*, exemplified by the other cases that were mentioned in our first division. They seem, however, to be not altogether different from those cases of furnaces, engines, &c., which have been quoted from the Year Books; for this latter class of fixtures were the effects as they are also the indications of the rise of modern wealth, being not indispensable to the bare or necessary cultivation of the ground or other the business of a farm, but being rather conveniences or utilities superadded to the early original list of necessities; and having had their origin under a milder law, they were protected from the operation of the older law by the equitable considerations which more modern manners supplied. Foremost among those equitable reasons was the favour shown to *trade*; and just as this one equity is the alone foundation of the law of the so-called Trade Fixtures, the second of the sub-divisions of this branch of our subject, so has it contributed the principal part of the foundation to the law of the so-called Mixed Agricultural Fixtures the first of these sub-divisions, for it has by counter-acting defeated the operations of the older and stricter law of purely Agricultural Fixtures, and it has in fact assimilated in all or nearly all respects the law of the so-called Mixed Agricultural to the law of the so-called Trade Fixtures

Proper. Moreover, the operation, not indeed of the *same* but of a *like* equity, and of an equity moreover which was equally the effect and the indication of modern wealth, has assimilated in like manner the law of the so-called Domestic or Ornamental Fixtures to the united law of the so-called Mixed Agricultural and Trade Proper Fixtures, so that in fact the customary distinction of the fixtures of our second division into the three classes of Mixed Agricultural, Trade Proper, and Domestic or Ornamental is groundless or futile in itself, however much it may hitherto have been thought to be subservient either to clearness of exposition or to accuracy of conception. We shall therefore not retain this distinction of phrases, but shall endeavour to effect a unification of the law in the three aspects of it which they apparently denote.

Nor do we think that our attempt is either ~~idle~~ or unprecedented. It is not unprecedented, for Mr. Amos and Mr. Ferrard, in their well-reasoned but in some respects imperfect treatise on this subject, contend in one place, and contend truly although inaccurately, that in the passage next hereinafter quoted from the Year Books, the relaxation of the law in early times in favour of the tenant was not confined, as has been generally supposed, to trade erections alone, but extended to agricultural erections also. Nor is our endeavour idle, as we hope to prove by the success of it.

The passage from the Year Book to which we last referred is a further part or continuation of the passage already quoted under the year 20 Hen. VII., and is to the following effect:—

“If a lessee for years make a furnace ‘*pur son avantage*’ (or ‘*pur son plaisir*’), or being a dyer, make vats and vessels ‘*pur occuper son occupation*’ for the time during which his tenancy is to last, then he may remove them; but if he permit them to remain fixed in the earth after the expiration of his term, then they become the property of his lessor; and so of a baker. Nor is it waste (in

the opinion of some, although not also of others) to remove articles of this sort during the term."

Now with reference to this passage we should contend for a more thorough and complete extension in early times of the relaxation which was then made in the rigour of the old law of fixtures, and we would suggest that the relaxation (always excepting those strictly Agricultural Fixtures which belong exclusively to the old law) was general, and extended not merely to Trade Proper fixtures, but also and equally to the Mixed or Modern Agricultural, and to the Domestic or Ornamental classes of fixtures; and our contention and suggestion in this respect seem to be entirely borne out and supported by the later decisions to which we now proceed.

In proceeding with, or in resuming our inquiry into and investigation of, the cases upon this branch of our subject, we find that the principle which we were at pains to elaborate on a previous page here or now begins to be positively serviceable to us, reminding us (as it does) to first ascertain the quality of the inheritance or *res principalis* before attempting to adjudicate upon the fixtures or appendages to it. And again, that early agricultural relation, which we were also at pains to explain on a previous page, renders us here also or now a negative service which is almost as valuable as the positive one, reminding us (as it does), in its turn, that the rigour of the old law of that relation does not extend to the matters which are exclusively the subject of the new law. It follows, therefore, at once that in this second ^{Trade} branch of our subject, and in respect of all those fixtures which are part of the subject of the new law, equitable considerations are now as highly paramount over legal ones, the tenant ^{fixed} ^{for} now as highly favoured as he was formerly depressed, and a long string of consentient decisions illustrates, as it corroborates, this indulgence. Thus, in the year 1704, it was held in *Pool's case* (Salk., 367) that certain *vats* put up by the tenant, who

was a soap-boiler, were removable by him, and had therefore been lawfully taken by the sheriff under a *fi. fa.* upon an execution issued against him. Again, in the year 1799, it was held in the case of *Dean v. Allalley* (3 Esp., 11), that certain erections called Dutch barns, being sheds with a "foundation of brick in the ground, and uprights fixed in, and rising from the brick work and supporting the roof, which was composed of tiles, the sides being open," were not included within the scope of a covenant by a tenant whereby he had bound himself to leave all the buildings which were at the date of the lease already erected, or which should or might during the continuance of the lease be erected upon the land demised to him, Lord Kenyon (the judge who tried the case) being of opinion, that erections like the barn in question which were put up for the benefit of trade or manufacture, for the more advantageous carrying on thereof, were not included under the word "*buildings*" or "*erections*" expressed in the covenant, which he said were only such buildings and erections as were "annexed to . . . the reversionary estate,"—a subtlety of distinction the justice or correctness of which, although it is not at first sight apparent, becomes apparent enough when, on the one hand, that paramouncy of equitable over legal considerations, to which we have referred as characterising the relation of landlord and tenant under the new law, is taken into account, and when, on the other hand, it is also considered that the erections in question, although Agricultural, were the follow-
Mixed or Modern Agricultural sort which we stated

useful and convenient in the profitable management, unnecessary to the bare or simple management of the farm, and the others being so they fell in fact under the mildness of the new, and were exempted from the rigours of the olden, law.

Again in 1801, in the case of *Penton v. Robart* (2 East, 88) it was held that a certain *Varnish-house*, put up by a tenant

who was a maker of varnish upon the land demised, and being an erection which had a brick-foundation let into the ground with a chimney belonging to it, and which in its upper part or super-structure consisted of wood brought by the tenant from his former place of business, was removable by the tenant at the end of his term, and under the particular circumstances even after the end and full expiration thereof, Lord Kenyon (the judge who tried the case) resting his decision in this case also (as he had done in *Dean v. Allalley*, *supra*) upon the "costly" or supererogatory and unnecessary character of the fixtures, as distinguished from those which are barely necessary for the cultivation of the land as such—a distinction which may indeed be fathered upon Lord Kenyon, whose customary legal acumen perceived in it a means of observing the law at the same time that he escaped in the matter of modern fixtures from the early rigours of it.

Again, in the year 1830, in the case of *Grymes v. Boweren* (6 Bing., 437) it was held that a *pump* was removable by the tenant who had erected it; and although the decisions of the Lord Chief Justice (Tindall), and of the other judges who decided the case, proceeded to all appearance exclusively upon considerations suggested by the mode or measure of the annexation, yet we must assume that there was also in their minds an underlying conviction or perception that the fixture in question was not (as in fact it was not) one of the old agricultural class of fixtures, but was rather one of those convenient or useful erections peculiar to modern times. It may be, however, that in this case, and it appears beyond all question that in the cases which were decided subsequently thereto, the conviction or perception to which we have alluded dropped altogether out of view in respect of those so-called fixtures, which were removable in their entirety without damage to the freehold, and fixtures of the last-mentioned class came in consequence, by an abusive extension of the modern principle, to be regarded even when put up for the

purposes of agriculture as being of an essentially *chattel* nature. Thus we find that in the case of *Wansboro' v. Muton* (4 A. & E., 884), decided in the year 1836, it was held in apparent confirmation of, yet in real contrariety to, the like case of *Culling v. Tuffnal* before set forth, that a barn (called a stavel-barn) consisting of "wood resting on, but not fastened by mortar or otherwise to certain caps or blocks of stone (called stavels or staddels) fixed into the ground or let into brickwork, the brickwork being built on and let into the ground in those parts where the ground was lowest, for the purpose of making an even ground for the barn to rest upon," was removable by the tenant who had erected it; for, in the words of Lord Chief Justice Denman (one of the judges who decided the case), "the first question to determine was, whether the erection was a part of the freehold; for if it was not united to the freehold, then it was no part of it; and as in fact it was not so united, it was therefore not a fixture," and Mr. Justice Little (another of the judges who decided the case) remarked, "In removing the barn, he does not disturb the freehold; . . . he might take away this building, and substitute, for instance, a fowl-house for it, keeping always the same foundation. . . . This barn is kept in its place merely by weight."

It is most important to remark this change in the point of view from which the question of fixtures is regarded in the more modern decisions, for the effect of it was and is clearly to subdivide the class of the Mixed or Modern Agricultural Fixtures into two minor classes, namely—(1.) The class of fixtures which, although of the modern type, and therefore (as being subject exclusively to the modern law) removable by the tenant, are yet visibly and corporeally, or in some other particular manner, fixed to the land or premises, and so long as they are so fixed are for all the purposes of the modern law part and parcel of the freehold; and (2.) The class of fixtures which being, whether *rightly* or *abusively*, of the modern type, and therefore subject ex-

clusively to the modern law, are yet neither visibly nor corporeally, nor in any particular manner, fixed into the land or premises, but are always and at all times *chattels* only. The importance of this subdivision appears more especially in its application to the law of *distress*. It is well known, and indeed it has repeatedly appeared in the quotations which have been made upon previous pages of this article, and more especially in those of them which are taken from the Year Books, that in early times the fixtures put up by a tenant were not distrainable by his landlord for rent; and the reason of their exemption from this process is too apparent for us to mention here. But when the old law came to be relaxed in the manner we have pointed out, then it was not so clear how that relaxation was to operate upon the law of distress; while the tenant acquired the advantage of *removal*, was he also to retain as before his right of exemption from *distress*? Or if he was to retain this latter right, was he to retain it *in toto*, that is to say, to its fullest extent, or was he to retain it as to part, and to remit it as to all the rest?

Now the law upon this matter, and in this respect, ending as it did in a compromise, wanted several decisions to settle it. For our purposes, however, the two decisions of *Darby v. Harris* (1 Q.B., 895), decided in the year 1841, and *Hellawell v. Eastwood* (6 Exch., 295), decided in the year 1851, sufficiently settle and express the law in its twofold modern distinction between fixtures that are distrainable and fixtures that are not so. In the case of *Darby v. Harris*, the fixtures regarding which the dispute arose, were "a kitchen range, a register stove, a copper, and also grates," annexed to the freehold in the ordinary manner and admitted to be "fixtures removable by the tenant." The contention on the part of the plaintiff, the tenant, was this—that this class of fixtures were not distrainable for rent; the endeavour of the defendant, the landlord, on the contrary, was this—to show that the alleged fixtures were in reality not fixtures, or at least not so much fixtures

as they were chattels or personal estate, in which latter case he contended that they were lawfully distrainable for rent. The Court of Queen's Bench decided that the articles, the fixtures in dispute, were of the class that was not distrainable for rent, and for this reason (as appears from the several judgments which were delivered), that they were things which, from the nature of them, could not, after payment of the arrears of rent, be restored again to the tenant in their original plight and condition.

On the other hand, in the case of *Hellawell v. Eastwood*, the fixtures around which the contention centred were "cotton-spinning machines, fixed by means of screws, some into the wooden floor, some into lead, which had been poured in a melted state into holes in stones, for the purpose of receiving the screws," and the contention on the part of the plaintiff, the tenant, was, as in *Darby v. Harris*, that articles of the sort in question were parcel of the freehold, and, moreover, that they could not, if removed, be restored again in their original plight and condition, but Baron Parke (the judge who decided the case) was of opinion and held that they were in no sense part or parcel of the freehold, and on that count, therefore, were not exempted from distress; moreover that they were capable, after being removed, of being restored again in the like plight and condition, and, therefore, neither on that count were they exempted from distress; they were, therefore, lawfully distrainable. The learned Baron, after disposing of certain preliminary matters, proceeded in his judgment as follows:—

"The only question, therefore, is whether the machines when fixed were parcel of the freehold, and this is a question of fact.

. . . Now, in considering this case, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; . . . they were never a part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose

of keeping it stretched out. . . . They never ceased to have the character of movable chattels, and were therefore liable to the defendant's distress."

The reader, we trust, will not suspect us of having garbled this judgment for the purpose of serving our own particular views, for indeed the omitted passages are altogether irrelevant to the point which was in dispute, and having therefore no application to the particular matter, they are expressed with an unfortunate vagueness of generality which has caused them to be frequently misunderstood, as was indeed observed by Vice-Chancellor Wood in the important case of *Mather v. Fraser* (2 K. and J., 536) hereinafter set forth.

From the two cases which have been now latterly stated, it clearly appears that at the date of those cases the law of fixtures considered in the abstract had become as definitely and fully stated and known as it is at present, and accordingly the point in dispute thenceforth has been, and now is (as it then partly was) some fact or thing external to the law itself, being some peculiarity of circumstances—either (1.) In the method and measure of the alleged annexation to the freehold; or (2.) In the construction of some written document, which by the act of the contending parties themselves or otherwise has been made to govern or regulate their rights; or (3.) In the effect which is to be given to certain *derivative* rights, the consequences of certain *derivative* relations which have come (in whatever way) to be vested in and established between the contending parties.

In considering the subsequent decisions, it is, however, still most essential and necessary, not merely with a view to the consistency of our scheme, but also by way of a preservative against incorrectness in practical opinion and decision, to bear in mind the precise relation in which the modern law stands towards the ancient one in this matter of fixtures, and in particular, first of all to settle with ourselves whether the particular alleged fixture is of such a

nature as to fall within the rigours of the old law; secondly to ascertain what is the quality of the inheritance in each particular case, and whether, therefore, the particular alleged fixture has or has not such a correspondence with or affinity for the inheritance as to have become not only actually but indissolubly united with it; and then thirdly, or lastly, and always in subordination to the matters firstly and secondly mentioned, to consider the weight which is to be attached to any one or more, or to all of those three external matters to which we have just referred, that is to say, the mode of the outward and visible annexation, the contents of some particular document, or the derivative positions of the contending parties. For it is only by keeping in mind all these numerous matters, and by observing their respective due priorities of importance, that we can either estimate new cases as they arise, or test the consistency of the existing cases either with each other, or (and more especially) with the earlier decisions.

By way of illustrating the application of this somewhat complex rule of decision, we may refer to the following cases (being all of them cases which have been already mentioned *supra* in a different respect or for a different purpose). (1.) To the case of *Elwes v. Mawe*, as an instance of the application of our rule having stopped short at the first part of it, the fixtures in that case having in fact been caught and stopped in the first sieve, by having been determined to be of the old or strictly agricultural kind. (2.) To the case of *Lawton v. Salmon*, and to the case of *D'Eyncourt v. Gregory*, as two instances of the application of our rule having proceeded as far as to the second part of it, the fixtures in these latter two cases having safely passed through the first sieve, but having been caught and detained in the second one, by having been determined to be fixtures of the modern class (whether Trade Proper or Ornamental), but to have at the same time presented that species of affinity for the *res principalis*, or inheritance, which caused them to become straight-

way united in a chemical and indissoluble union with it. (3.) To the case of *Hellawell v. Eastwood*, as an instance of the application of our rule having been carried to its furthest stage, the fixtures in that case having passed through both the first and the second sieves, and having had their character determined for them by the first one of those subsidiary external considerations before enumerated, to wit, by the mode of their annexation to the freehold; and we may here mention that the rule in this last mentioned extent of its application will find constant illustration (alone or in combination with other ingredients) in the cases which are yet to be set forth in the sequel of our article.

ART. V.—THE REFORM OF THE PROCEDURE OF THE ENGLISH COURTS.

THERE can be no doubt, but that our judicial system time-honoured as it is, will within a very few years be put upon its trial like every other institution in the land. Indeed, our surprise is, that public opinion has not long before this carried the outworks of legal conservatism, compelling the citadel to surrender upon almost any terms. This tardiness of action on the part of the public has no doubt its cause in the want of acquaintance with our laws; for technical barriers have all but excluded the laity from a true knowledge of the law. To listen to the remarks of any layman, would all but lead a stranger to believe, that the laws of England and its people were separated from each other as the poles of our globe. Reform has been tardy, because the task appeared impossible. Any suggestion from the public has invariably been met by pointing to the 1100 volumes of Law Reports that hold possession of the shelves of the legal *literati* of our land; and it has

been affirmed that the task of reform was simply impossible. This conviction has been strengthened by actual experience. A suitor in a Court of Equity, no matter what his sagacity, must have felt that the mysteries of the Procedure of the Court were far beyond his ken, and all that he could possibly understand would be the heavy costs of the journey through the unknown territory, he had ventured to enter with such unguarded self-willed perversity. Lord Westbury, in his address to the Juridical Society (1869), alludes to this helplessness of a suitor; to the enormous costliness of the experiment; that we may well venture, backed by the authority of his lordship, to avow our conviction, that if the public could only be made to understand that the evil was remediable, the Legislature would be compelled to give its earnest attention to the absolutely necessary legal reforms which advancing civilisation so imperatively requires.

The guide we have chosen, to which we trust our most fastidious opponents will not object, in conducting our steps through the labyrinth of difficulties legal reform presents, is no other than that of the Report of the Judicature Commission; and though for the purpose of the present inquiry we propose to confine our remarks principally to the proper Procedure of our courts, it will be nevertheless all but impossible not to touch upon the important question of our Courts of Appeal, embraced in that Report. But of this when we have passed the portals of the hall of justice, and find our suitor, after battling bravely through a thicket of pleadings, upholding his head before a Judge.

To commence, then, what is the present state of our Courts? how many are there? and what has the suitor to determine before he can even take the first step towards asserting his right? We will commence with our Equity Courts; here we have three Vice-Chancellors and the Master of the Rolls sitting as judges in the first instance. These Courts have of course a Procedure of their own, and bill, answer, petition and interrogatories, or by whatever

name the proceedings before the Court may be styled they are technical, and only adapted for the use of these particular Courts. The practice of the Chancery Courts has, indeed, become quite a distinctive science, and a glance at the text-books and books on practice would warn any unwary suitor not to enter. We instance Smith's or Daniell's "Chancery Practice," or Lord Redesdale "Treatise on the Pleadings in the Courts of Equity." The thousands upon thousands of pages these and other learned authors have devoted to the mere practice of the Courts, speak in volumes of the strange anomaly our laws exhibit. The kernel that lies hidden beneath this hard crust, the scientific power of our equity jurisprudence, so justly admired by every jurist, is wholly incomprehensible to the public, for whose use and protection, after all, this elegant structure has been created by the genius and learning of our Hardwickes, Eldons, Ellenboroughs, and those who have succeeded them. But just in proportion as the Courts of Equity have created a practice, and Procedure of their own, so have the Common Law Courts developed a complete and independent system, as distinctive in its function as if language and race had severed the Common Law from the Chancery Courts. Books of practice of course had to be written, and if weight, or the number of pages had aught to do with merit, we much fear the Common Law side would win the day; Chitty's Archbold's Practice, Leake & Bullen's Precedents of Pleadings, Chitty's Forms, Precedents, Lush's Practice, and other works, their name is legion, crowd the shelves of the practitioner; and beneath, or rather within, these mighty books may be traced the outlines of a system of Procedure specially adapted to our Common Law Courts, with their trials by jury, sittings in Banc, and Appeals to the Exchequer Chamber.

We have thus two distinct Procedures; but here the evil does not stop. Unfortunately for the unhappy suitor other difficulties may beset his path; he may have to prove a will; or, possibly, his ship may get into some mischief; or

his debtor has gone wrong. As each of these possibilities become realities, fresh Procedures, new books of practice, other rules of court, distinctive nomenclatures crop up, and more money has to be paid, more time wasted, to clear away difficulties. The Probate and Divorce Courts enjoy each a Procedure of their own; their mode of trial is distinctive; their method of taking evidence varies from that of the Admiralty Courts. The rules of each of the Courts are, of course, different, and the books of practice of these tribunals betray the secret, that the Procedures of the Probate and Admiralty Courts, though of one common origin, have separated into two systems. In our Bankruptcy Courts we have the same evil; these Courts have also a practice of their own, and those who have to enter this legal arena for the first time, will find that every step they take is on untrodden ground, which has to be explored and measured.

This inveterate habit of creating distinctive Procedures does not, however, characterise solely our superior courts of record, for, as though in mockery of their masters, the minor courts have vigorously set to work to follow their example. The County Court practice owns as complete a labyrinth of its own as that of our Equity Courts; and the Lord Mayor's Court would prove to any of the *habités* of Westminster quite a *terra incognita*, save under the guidance of Woodthorpe Brandon's Practice of the Mayor's Court. If we superadd to these the Magistrates' Court, in which the important questions of Ratings have to be decided, with appeal to the Quarter Sessions, we have as huge a mass of Procedures and practice, huddled together, as the most extravagant adorer of that which is obsolete and useless could possibly desire. The Passage Courts of Liverpool, the Palatinate Courts, true to their traditions, have also created distinctive Procedures, and a practice of their own. We will, however, not dwell upon these, but name them only in as far as they mark the shoals and reefs of the coast line of the great ocean of the

unknown waters of the administration of law upon which unfortunate litigants are compelled to risk their all in asserting their rights.

The history of the origin of these different courts would no doubt disclose the causes that have produced the anomalous state of things we complain of, and it may not be uninteresting to the reader to follow us as we trace in brief outline the development of the Procedure of the different courts from their fountain head—"The Aula Regis," in which the king in bygone times presided in person, to the present day. From this "Hall Motes of the Kings," went forth the *brevia originalia* which gradually became the groundwork of distinctive Procedures in this country. Commencing with the "King's Bench," from which supreme tribunal emanated the *quo warranto* and *mandamus* writs, which Court had originally the sole cognizance of crime, we come to the "Exchequer Court," clothed with the special power of dealing with questions of royal revenues; and finally to the "Court of Common Pleas," (*communia placita*), which tribunal sat apart in the "*Aula Regis*," to determine private causes between citizens. Gradually these Courts assumed concurrent jurisdiction, and finally in the harvest days of special demurrers, which the Common Law Procedure Act of 1852 so rudely put an end to, England could boast of three Common Law Courts, each vaunting to have created a practice of its own, and though the pleadings had an outward appearance of conformity, the Procedure, the practice in each Court was perfectly distinct. If any of our readers should doubt our statements, we refer them with unhesitating satisfaction to the lucid and learned pages of Reeves in his "History of English Law," Vol. II.

There is no lack of history as to the origin of our Equity Courts, but of the early authors Fleta is the only one of our Common Law writers who mentions the existence of a "certain office called Chancery." Bracton, Britton, and

Glanville are absolutely silent. Lord Coke assigns the origin of Equity Courts to the time of Henry V.; but in Cooper's Pub. Records we may trace bills and petitions as having been presented fully fifty years prior to that date; and no doubt can be entertained that, if research were made, petitions or bills would be found to be extant during the reigns of our Edwards. But, be this as it may, the introduction of *uses* (that is, trusts, *fidei-commissa*) gave vitality to Equity Courts, Cardinal Wolsey with great skill expanding the limits of Equity jurisdiction of uses to increase his power. But we have only to deal with the cause of the origin of the distinctive Procedures, and can hence only afford to glance at the pages of history with that object. The vast differences that sever Equity from Common Law are mainly attributable to the controversies that formerly raged between the Courts of Common Law and Equity, of which the contest between Lord Coke and Lord Ellesmere in the time of James I. is an historical instance. Narrow views of public policy, the seductive influence of prerogative, possibly ignorance, perversity, or even mistake of principles of law, all had their weight in creating the differences that now exist. Is it then to be wondered at that the Procedure of the Courts should have been kept as distinctive as possible—the very jealousy of encroachment contributing to widen the gulf that severed the practice of the Common Law from that of the Equity Courts. We have here, then, an explanation of the cause of the wide difference, in form, in nomenclature, in practice, that distinguishes these Courts, and which we trust our Legislature will at last give its attention to, with a view of codifying these various Procedures into one system, to be equally applicable to all the civil Tribunals of the land.

In the Courts of Admiralty, and Courts of Probate and Divorce, the civil law ruled supreme in days gone by. Here Ecclesiastics assumed from the earliest times a supremacy and sway, and Bracton refers to the law in those Courts as a

special privilege to be exercised only by the spiritual guides. The Consistory Courts of every diocesan bishop formerly determined all probate and matrimonial causes, with appeal to the Arches Court and the Judicial Committee of the Privy Council. It is quite instructive to follow the Procedure of these courts: first the citation, then the *libellus*, then the answer, and, finally, the proofs, the judge determining the law and the facts; and though at present greatly modified by the enactments which closed Doctors Commons and sent a shoal of proctors to Westminster, the Procedure of these courts has retained much of the characteristics of its origin.

In our Admiralty Courts, the origin of the separate jurisdiction may be traced to the days of Richard II. Under that king, causes that arose on the high seas were referred to a special tribunal—the “Admiralty Court.” At a later period the Common Law encroached, and contracts made at sea became cognisable by them. We will not dwell, however, upon the different enactments that have modified and improved the jurisdiction of this Court, all we have in view is the Procedure, which in this tribunal had its origin in the civil law, modified to some extent by the Rhodian laws, and the laws of Oleron, and still partakes of the characteristic of its origin. The Judicature Commission, in speaking of these different Courts, says, “That the forms of pleading,” referring to the Courts of Chancery, the Courts of Common Law, the Court of Admiralty, and the Court of Probate and Divorce:—

“The modes of trial and of taking evidence are different, the nomenclature is different; the same instrument being called by a different name in different courts, almost every step in the cause is different. Each court is confined to its own forms of procedure. Nor is this difference due entirely to the different nature of the cases which the courts are called upon to try, for often the same question has to be tried and the same remedy sought, by a totally different method according as the proceeding is in the Court of

Chancery, the Courts of Common Law, or the Court of Admiralty.*

Can anything exceed this? and if we add that questions of fact are tried in the Common Law Courts by a jury, and that all but invariably, in our Equity Courts, the judge determines the fact and the law; whilst in the Courts of Admiralty the facts and the law are always settled by the Court, we can hardly realize the confusion that must and does arise from the use of these quaint, obsolete forms of Procedure to which the legal mind of England appears to adhere with undying tenacity. Learned foreigners, whose attention has been directed to the state of law in England, have frequently expressed their amazement at the complexity of our procedures. Professor Gneist,† in his "*History of the Administration of the Laws of England*," alludes to the enormous costliness of the law; attributing this fact to the predominant element of the county interests in the framing of our rules for the administration of justice. He boldly avers, that the squiredom that ruled England rather favoured than discouraged the costliness of legal Procedure; that the expensive luxury of law was regarded as a protection against encroachment from the lower strata of society; and that entails, family settlements, were specially in favour to protect county interests; the Bar, he adds, being principally recruited from the members of the upper classes, who carried with them all the likings, all the peculiarities and narrowness of thought a class invariably engenders.

As a natural result of this system of multiplying the Procedures in our tribunals, we have permitted a similar abuse to grow up in our Courts of Appeal, each possessing a Procedure of its own. In the House of Lords, the practice, the Procedure, is perfectly distinct from that observed in the

* Judicature Commission R., p. 10.

† Gneist, d. heutige Englische Rechtsverwaltung, Vol. I., c. iv.

Privy Council; hence it may arise, that in a suit the same questions, though the parties are different, may have to be decided by two final Courts of Appeal, and, possibly, though fortunately this is of rare occurrence, differently determined by each. But appeal to the Lords is so exceptional, owing to its enormous costliness (a case is known to the profession, in which the subject matter in litigation was 4000*l.*, and the costs, including the appeal to the House of Lords, in excess of 30,000*l.*), that we may, for all practical purposes, confine our remarks to the Courts of Appeal proper, namely, the Exchequer Chamber, for all Common Law Causes; the Courts of Appeal in Chancery, consisting of the Lord Chancellor and the Lords Justices; and the Privy Council, for appeals from the Courts of Admiralty and our Colonies. In each of these Courts the Procedure is as diverse as possible, and professional men, who frequent any one Court, know little if anything of the practice of other tribunals. A case might be suggested of a commercial firm established in England and in one of our colonies becoming bankrupt, and at the time of bankruptcy possessing shipping. In this hypothetical case, allow that disputes may arise as to certain liens upon the vessels; and further, grant that the colonial creditors, holding preferent bonds and other securities, should clash with the English creditors. What a stir amongst the lawyers! each question would need a staff of professional men apart; and should fortune favour, and final appeals be resorted to, the two ultimate Appeal Courts, the Privy Council and House of Lords, would be listening to arguments from two sets of men, taking different views possibly upon the same question. Thus it arises, that whether the suitor be *in jure* or *in judicio*, the sad fact stares him in the face, that unless his purse be full, and ever to be replenished, the Procedure, the mere practice of our Courts is such, that practically, justice will be denied him.

In the worst days of the history of the law of Rome we may trace perhaps a parallel to the obstructiveness of the ill-devised procedures in their courts, but the Roman jurist battled successfully to rid himself of these rigid forms;* and Walter's† tells us, how gradually the genius of that singularly gifted people, and more especially as evinced in the administration of their laws, broke through the trammels of restrictive rules, and finally established a procedure of which Keller‡ furnishes a short and clear narrative in his excellent treatise on that subject. It is to be regretted, that except a very imperfect treatise, or rather sketch of the outlines of civil law process by Professor Abdy,§ we do not possess any one work in the English language upon this important subject. "The value of a work of this kind can hardly be over-estimated, and would prove of the utmost use to the law student, as also to the legislator, in determining what the Romans had done towards reforming one of the most oppressive evils that can burden society, namely, defective Procedure in the tribunals of the land. On the Continent, jurists, in a great measure owing to their superior knowledge of the civil law, have arrived at a practical solution of this question years ago. The Code de Procédure Civil of the Code Napoléon possesses, whatever may be its faults, the inestimable advantage of system, and of

* Legal process in the times of the Emperors was as follows. The plaintiff commenced his suit by a *Libellus*, which was a short statement of the cause of action, coupled with a citation to enter appearance. This *Libellus* the defendant answered by a short reply, setting forth the nature of his defence, traversing the averments of the plaintiff. At this stage of the proceedings, the *Litis contestatio* (according to modern practice it is that stage of the cause in which the defendant completes his statement of facts) became operative, *replicationes et duplicationes* marking the progress of the cause. The proceedings were mostly oral, and by an order of Constantine (C. 9, pr. C. de testib; 4, 20), these oral statements had to be confirmed on oath and protocolled; documents and records were proved by the testimony of witnesses.

† Walter's Geschichte, d. Römischen Rechts. Bonn. 1860.

‡ Keller d. Röm. Civil Process. Leipzig. 1863. See also Windscheid. Düssel. 1857.

§ Prof. Abdy's "Historical Sketch of Civil Procedure among the Romans," 1857 (containing remarks upon the alteration by the Emperors; Roman Law of Evidence and power of Appeal).

unity of purpose; the pleadings are simple and freed from those antiquated forms and perpetual reaverments that characterise our declaration and plea, and of that useless prolixity our bills in Chancery are so deservedly famed for. In Italy the Code Civil, apart from its high scientific merits, Lord Westbury in his address to the Juridical Society, alluded to, contains a code of procedure as scientific as it is practical. The Procedure in Spain has also the merit of greater simplicity; the pleadings resemble the form suggested by the Judicature Commission, the substance of the facts upon which either side rely being intelligibly, not technically, stated, and is followed by a summary, called *Puntos de derechos y hechos*, or points of law and facts; the legal points, if any, being set forth in a manner not unlike the points for a demurrer our pleaders are only too well acquainted with, the record closing with a short prayer.

In the United States the pleadings are based upon the principle of rendering a brief narrative, as distinguished from the evidence; and in our colonies, we refer especially to the new Procedure of the Civil Courts of British India* the simplicity of the pleadings has elicited the most unqualified approval from every jurist we have consulted on this subject. Indian judges, who have visited our courts within the last year or two, have unanimously expressed their surprise at the needless cumbersomeness of the procedure of our courts; burdensome in the extreme to the judge, and entailing ruinous expense upon the unfortunate suitor.

Having thus far guided our reader through the paths of this labyrinth without pausing, we may be allowed to halt for a moment and draw breath, and ask ourselves—is there no way out of this difficulty? Must this land for ever be burdened with an useless, expensive Procedure? Are there no means of simplifying Appeals? The answer to all these questions may be obtained by a perusal of the Judicature

* Wm. Macpherson, Proc. C. C. of Brit. Ind, 1871.

Commission Report. The Judicature Commissioners, including the names of Lord Hatherley, Lord Cairns, Mr. Justice Erle, and other eminent judges and jurists, have for some time past devoted their attention to this all important question, and in March 1869 first published their Report. But for reasons we cannot fathom, no progress has been made since then, and the present state of things has been allowed to continue, and this though it is admittedly a reproach to the legal capacity of this land that no reform has been attempted. We can understand how the evil arose; how, as we have shewn, by gradual growth, the practice of the day had become the fixed permanent rule of the morrow; how each sphere of business life became restricted to special tribunals; how each tribunal in its turn created a Procedure, a practice of its own, and with characteristic tenacity clung to these as rallying points in the perpetual conflict with other courts. But we are, we admit, totally at a loss to understand why, now that the infancy of our race has passed, we should cling to every rag of antiquated form, and that in the face of the urgent need for a change altered conditions imperatively demand. In proof that we are not transcending legitimate limits, we will cite what our judges say (Jud. Comm. R., p. 11):

"The best system," says the report, "would be one which combined the comparative brevity of the *simpler* forms of Common Law pleadings with the principle of stating intelligibly, and not technically, the substance of the facts relied upon as constituting the plaintiff's or the defendant's case, as distinguished from his evidence. It is upon this principle that most modern improvements of pleading have been founded both in the United States and in our own colonies and Indian possessions, and in the practice recently settled for the Courts of Probate and Divorce."

Can anything be more reasonable, more to the point? The object of all pleadings, of all preliminary stages of the cause before the tribunals are reached, is to eliminate ex-

traneous matter, to get at the truth; and further to determine what are the facts, what the law the courts are called upon to decide; anything beyond this only leads to the gravest errors, to needless delay, to useless expense.

It is hard enough to sift out the truth, to arrange the evidence, to judicially establish the facts; it is no easy matter when this task has been accomplished then to apply the law, without being overweighted by meaningless technicalities, which, if they do not actually bewilder the practitioner, needlessly tax his strength.

The next question to be considered is that of the mode of trial and the production of evidence. Here again we refer with pleasure to ourselves to the suggestions of the Judicature Commission. Any one acquainted with our *Nisi Prius* causes will be aware of the needless loss of public time by citing witnesses to orally prove the simplest fact. This defect it is proposed to remedy by adopting the system of continental procedures, namely by obtaining either a voluntary statement on oath, or by examining a reluctant witness before a judge appointed for that purpose; and we further suggest, that should oral examination in open court be resolved upon, leave should be obtained in chambers in the first instance, except where the immediate parties to the suit are called upon to give evidence. Of course we submit that the mode of taking evidence ought to be similar in all the courts, so that whenever appeal is resorted to, the Appellate Courts may not have the useless task imposed upon them of unravelling the meshes in which different and conflicting procedures have involved questions.

We have not space to dwell upon the practice that has of late sprung up, and this more particularly in our Chancery Courts, of referring all questions that involve accounts, or are in themselves too complicated to be dealt with in open court, to a judge in chambers, which practically means to the chief clerk, whose functions have risen from those of a mere ministerial duty to the important office of a judge of the first

instance, with appeal to the Vice-Chancellor. No greater anomaly could exist; we say this with every respect towards a body of men upon whom an impossible task has been thrust. Unsupported, unchecked by the presence of the Bar, the chief clerks in Chancery administer a rude kind of justice, which no one can realise unless personally acquainted with the working of the system. In our County Courts, it is true, the selfsame error exists, the all but total exclusion of the Bar has allowed a slipshod rough-and-ready administration of justice to be tolerated, unhindered, unchecked, but as here the jurisdiction is limited, the evil is prescribed within determinable bounds. Not so in the case of the chief clerks; here there is no limit, and the inefficiency, the danger of the present system stands forth in all its nakedness.

The result of our present judicial system is, that all classes, and more particularly commercial men, prefer almost any course to that of open litigation; so dreaded is this appeal to a court of law, that a man in trade, whom circumstances have placed before the public as a litigant, is looked upon askance, and his business suffers proportionately. Yet differences will arise every day, and to escape the horrors of legal proceedings, private references, any rough-and-ready mode is resorted to, to settle the questions in dispute. We have availed ourselves of the opportunity on many occasions to take the opinion of leading men in the City on these questions; their reply is unanimous. "We do not know," say these men, "where the remedy may be found, all we know is the evil exists; practically the courts of this country afford no relief to the trader." And so common is this opinion, both in England and abroad, that some two or three years ago, some large orders for machinery and rolling stock for Russian railways were handed to French and Belgium manufacturers, though at prices a shade higher than those tendered by English makers, the foreign buyers giving the preference to France and Belgium, principally because in case of dispute, any differences could be speedily settled, without the terrible

costliness legal proceedings in this country would expose them to.

It may be replied in answer to all we have said, "Then do not go to law, hold your hand," in other words, suffer a wrong, rather than ask for your rights. The enormous transactions, the constant transfer of property, by sale, by succession, inevitably call forth skilled aid to adjust the differences that must arise where such endless variety of interests come into contact with one another. Without such skilled aid, the greatest injustice would be hourly done, and the unprincipled, unscrupulous man would win the prize, the honest man would shrink from grasping. This skilled aid is furnished by the State by the means of the tribunals of the country, paid for by the people, and the public have a just cause of complaint the instant circumstances occur which preclude the fullest, freest use of the tribunals for the business purposes of the great life of the Empire. That such full, free use of our courts of justice is not made by the public is in itself a public evil. In Russia, in Turkey, in Spain, corrupt judges render it unsafe to appeal to the courts; no such dread exists in England, no judges in the world excel our judges for purity, for punctilious observance of that which is right. The public have implicit faith in the soundness of their judgment, in the absolute righteousness of their conduct; but how to reach justice, how to approach the judges is a question hitherto unsolved, save at an enormous cost and loss of valuable time. This costliness, this loss of time, arises principally from the quaint, obsolete Procedures we adhere to with *undying tenacity*, and in lieu of taking a bold step in advance, by at once consolidating the numerous Codes into one, we attempt by piecemeal legislation to unite as many Procedures as there are digits on our hands into one machinery, and expect that this ill-devised clockwork will answer its purpose. And whilst men are pondering and pausing, the public suffer, and we must continue to bear with the just reproach of able foreigners

who unhesitatingly proclaim that we are not lawyers, that we cannot grapple with the question of reform in England, though we have solved the difficulty in India, and in many of our colonies; that we are shrinking from reforms every nation in the civilised world has had the courage to undertake. In Prussia a commission is now sitting to consider the best method for remodelling the Procedure of the courts of northern Germany; at this commission the ablest jurists of the land are invited to attend, and the opinion of eminent lawyers of neighbouring States has been cordially invited by the Government to aid in framing new rules of Procedure.

We must, however, conclude; whatever may be the fate of the Second Report of the Judicature Commission now about to be published, whether it will be acted upon or not, we earnestly hope that the public will not tamely submit to further delay, but will support those able and eminent judges and jurists who are now considering the question, in their endeavour to reform the Procedure of the courts of this land, and compel the Legislature to adopt measures for the codifying of the Procedures of this land into one well digested system.

ART. VI.—NOVATION OF OBLIGATIONS ACCORDING TO THE MODERN ROMAN LAW. By FREDERICK J. TOMKINS, M.A., D.C.L., of Lincoln's Inn, Barrister-at-Law.

A CAREFUL examination of the different kinds of rights recognised both in what is termed the classical and the modern Roman law, will render it apparent that a right of claim, or, as we usually term it, an obligation, differs from all other rights in this respect; that whilst, as the rule, it is in the interest of the person entitled to a right that it should be continued and preserved, it is in the interest of the person having a right of claim or obligation that

it should be terminated, or as it is technically expressed, be solved. In every obligation the chief interest of the creditor resides in what is termed the *solution*; and it is this marked peculiarity that distinguishes obligations from all other rights.

In the present article it is proposed to examine one mode among many, by which an obligation may be solved according to the "*Modern Roman Law*." Hence it becomes absolutely necessary clearly to apprehend what is understood among jurists by this expression. A recent writer in a leading law periodical has fallen into a singular error as to what is implied by the expression, "*Modern Roman Law*." Attention is called to this definition, lest some English jurists should make the same mistake as this writer. He says:—

"Modern Roman Law is not a very happy expression, but it indicates with sufficient clearness that portion of the Roman Law now existing in those countries whose law is based upon the vast mass of legal matter which was gathered together in the sixth century by Justinian."

The very opposite of what is stated in this loose explanation would be a nearer approach to the truth. In the first place, "*Modern Roman Law*" is both appropriate and significant, hence it has been adopted by all the great continental jurists—by Savigny, Thibaut, Mühlénbruch, Puchta, Arndts, Rudorff, Böcking, Von Vangerow, and many others. Further, it does *not* indicate, "*Roman Law based upon the vast mass of legal matter which was gathered together in the sixth century by Justinian*." The person who wrote this sentence could never have read what modern jurists designate as the "*Corpus Juris Civilis*;" nor could he have perused the introductions to its several parts, or he would have learned that "*Modern Roman Law*" is based upon something very different from the "*vast mass of legal matter*," as he terms it, "*gathered together in the sixth century by Justinian*." It was, indeed, from the "*vast*

mass of legal matter" referred to that the "*Corpus Juris Civilis*" itself was compiled. Whether this writer meant by "the vast mass of legal matter which was gathered together in the sixth century by Justinian" what the words literally express, namely, the materials from which the "*Corpus Juris Civilis*" was produced, or whether he meant the "*Corpus Juris*" itself, he does not say, and it seems probable that when he penned the remarks cited, he had not himself a clear idea. Now the "*Modern Roman Law*" is not based merely upon the legislation of Justinian, for the legislation of Justinian only possesses vitality in the "*Modern Roman Law*" in so far as it has been glossed; that is to say, in so far as the glossators of the middle ages have, by their comments, declared it to be applicable in practice.

What then, it may be properly asked, are the sources of the "*Modern Roman Law*?" And this indeed is a question that must be answered before we can fully comprehend any of the doctrines of modern civilians.

The sources of the *Modern Roman Law* are the following:—

(1.) The Roman law in the form given by the Emperor Justinian, as annotated by the glossators.

(2.) The Canon law consisting of four constituent elements; and the decrees of the Council of Trent relating to marriage. The rules of the Canon law, it is of importance to observe, affect both temporal and spiritual matters.

(3.) The native German law, partly contained in the laws of the empire, in part originated by force of custom, or accepted for its scientific and legal merit. Under this head of special importance are the following:—The Code of Procedure of the Supreme Court of Judicature, 1555; the Notarial Rules of Maximilian, made in the year 1512; the Criminal Code of Charles V., promulged in the year 1532; the Decisions of the Diet at Spire, 1529, relating to the succession of first cousins; the Police Regulations of 1577; and the final Decree of the States of the Empire made in

1654, which Decree also touches upon the very subject under consideration. Such, then, let it be remembered, are the elements of the "Modern Roman Law."

It is of the Novation of Obligations according to the "Modern Roman Law," in the sense in which that term is understood by continental jurists, and just explained, that it is now proposed to speak.

Without going into details as to the various modes in which obligations may be extinguished, it will suffice for the present purpose to observe, that every solution may be arranged under one of two heads. All obligations are solved or extinguished either *ex professo* or *per consequentiam*. For instance, an obligation is extinguished, *ex professo*, by payment, by deposition and dereliction, by *Novation*, by transaction, by *res judicata*, and by several other modes. Again, an obligation is extinguished *per consequentiam*, by compensation, by confusio, by the creditor's interest ceasing, as a punishment, and by some other methods.

By Novation, which is, then, a mode of solving an obligation *ex professo*, is understood the extinction of an existing obligation by constituting a new one that is destined to stand in its place. Ulpianus says, "*Novatio est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio, hoc est, quum ex præcedenti causa ita nova constituitur, ut prior perimatur.*"* Let it be observed that it is the "*transfusio atque translatio*" of the prior obligation into the new one. Further, every Novation is essentially *privative*, and the division of Novation into *privativa* and *cumulativa* is, to use the expression of Puchta, a "*contradictio in adjecto.*"† No notion could have been more foreign to the mind of a Roman jurist than that of a *novatio cumulativa*. A further division of Novation in classical law was into *novatio voluntaria* and *novatio necessaria*.

* L. xi. 14, pr. s. 1 D. de novationibus, etc., (46, 2.)

† Puchta Vorlesungen, s. 291.

It was said to be *voluntaria* when it was effected by the will of the parties, and *necessaria*, when it was effected by the consumption, as it is termed, of the obligation at the stage known as the "*litis contestatio*;" or upon judgment being solemnly and legally pronounced (*res judicata*).

The effect of the "*litis contestatio*" or issue was, either directly or indirectly, that is, either *ipso jure*, or *ope exceptionis*, to consume the original action, and to create a new obligation. It was in reference to this new obligation, and to the similar result produced by *res judicata*, that the form of expression found in Gaius was employed. "Ante litem contestatam dare debitorem oportere, post litem contestatam condemnari oportere, post condemnationem judicatum facere oportere."*

The plea of "*res judicata*" was held to be *peremptory*, and it was a complete, and as the rule, a perpetual answer to an action. There can be no doubt but that in a certain sense the "*litis contestatio*" gave rise to a true novation, "Inchoatis litibus actiones novavit," says the Vaticana Fragmenta.† And Ulpianus says, in speaking of that mode of Novation known as delegation, "Fit autem delegatio vel per stipulationem, vel per *litis contestationem*."‡ It is to this kind of Novation that, at the present time, the epithet *necessaria* has been applied. But there is by no means a perfect identity between *voluntary* and *necessary* Novation, and it is to the former kind only that the term Novation is now strictly and properly applied. The "*litis contestatio*" had the effect of creating another and a distinct obligation which some jurists have improperly designated as *cumulative* to the prior one.§

A further division of Novation in the Modern Roman Law is that of *simplex* and *qualificata*. Novation is termed

* Gai. III. 180, 181, and notes r. s. (Tomkins and Lemon's Edit.) IV. 106-108.

† S. 263. ‡ L. 11, s. 1, D. de novat. (462).

§ See Von Vangerow Pandekten, Vol. I., s. 160, for a fuller discussion of this point.

simplex when no alteration takes place either in the debtor or the creditor, but when a new obligation only is created. It is termed *qualificata* when there is a new obligation with new parties. If, for example, I have a claim against A for the performance of a certain thing, or that B must pay me 100*l.*, and C comes forward and promises to pay me what is due to me from A or B, this is designated technically an "*expromissio*." Paulus puts this very case "Te hominem et Seium decem mihi dare oportet; stipulor ab altero novandi causa ita: *Quod te aut Seium dare oportet; utrumque novatur*. Paulus, merito, quia utrumque in posteriorem deducitur stipulationem."* In this way the expromissor takes upon himself the obligation of another, and steps at once into his place as debtor; the effect of which is to free the original debtor from his liability to his creditor. But it is clear that the change may be made not only in the debtor but in the creditor, and this is termed *exstipulatio*. Such a change is said to take place "*ex stipulatu*," X takes the place of the creditor, and the debtor renews the promise to X. It is obvious that this alteration can only take place when the original creditor consents.

The technical name for this mode of assignment by an original debtor or creditor to another person who is to stand in his place is "*delegatio*." The prior debtor or creditor is termed the *delegans*, the new debtor the *delegatus*, and the new creditor the *delegatarius*. Ulpianus says, "*Delegare est vice sua alium reum dare creditori, vel cui jusserit*."† The proper form for effecting a *delegatio* was the stipulation, although in one passage "*litis contestatio*" is mentioned as one mode of accomplishing it. "*Fit autem delegatio vel per stipulationem vel per litis contestationem*." It might, however, be made under certain circumstances in a less formal manner, when one of the

* L. 32, Dig. de novat. (46, 2). † L. 2, Dig. de novat. (46, 2).

parties was labouring under physical infirmity. Thus Ulpianus says, "*Delegare scriptura, vel nutu, ubi fari non potest, debitorem suum quis potest.*"* It was not necessary that the *delegatus* should be the debtor of the *delegans*, though such would be probably often the case, as the *delegans* standing in the twofold relation of creditor to the *delegatus* and debtor to the original creditor would be able in many instances in this way to free himself from his liabilities; but "*Delegatio debiti, nisi consentiente et stipulanti promittente debitore, jure perfici non potest.*"*

There is, in some respects, a great similarity between a delegation which produces the Novation of an obligation and that mode of assignment which is denominated "cession." The difference, however, between the two is the following. When a cession of an obligation is made, the *cessionarius* as assignee becomes entitled to avail himself of the action arising out of the obligation assigned. There arises no new obligation. On the other hand, in the case of a delegation, the creditor or *delegatarius*, is a new creditor having all the rights arising from a new obligation; the matter only of the new obligation being the same as the old. An important consequence of this is, that every Exceptio must be decided in accordance with the new obligation. In the case, however, of what is termed a *passive* delegation, it is held that a subordinate species of cession is created, attended by all the incidents of a future cession, especially with the *Beneficiûm S. C. Vellejani*.

The requisites for a valid Novation are the following :—

Firstly, the existence of two valid obligations, one of which is called the prior obligation, the other the new obligation. If the prior obligation is invalid, the posterior obligation possesses no force whatever. It may sometimes happen that the prior obligation is only what is termed a *natural* obligation, that is, an obligation without an action, and

* L. 17, Dig. de novat. (46, 2). † L. 1, Cod. de novat. (8, 41).

the object of the Novation may be to transmute it into a civil obligation, or the case may be *vice versâ*.

"*Illud non interest*" says Ulpianus, "*qualis processit obligatio, utrum naturalis, an civilis, an honoraria, et utrum verbis, an re, an consensu; qualiscunque igitur obligatio sit, quæ præcessit, novari verbis potest, dummodo sequens obligatio aut civiliter teneat, aut naturaliter; utputa si pupillus sine tutoris auctoritate promiserit.*"*

Again, when there is a condition in the prior obligation, and the condition is fulfilled, the new obligation which takes its place by the Novation is said to be *pure*. If, however, the condition in the prior obligation be defeated, then the Novation falls to the ground; it is a legal nullity. There are some traces in the writings of the Roman jurists of controversy upon this point, but at present the law is well settled. Gaius says:—

"But when we have said that a Novation arises if a condition is added, it must be understood that we affirm the *Novation* will only take place if the condition is accomplished; otherwise, if it shall have failed, the prior obligation remains. . . ."

"According to the opinion of Servius Sulpicius, a Novation immediately arises, even whilst the condition is pending; but if the condition should have failed, no action could be maintained, either upon the one ground or the other (*ex neutra causa*), and in that manner the thing was lost. From which it follows, as he says, that if any one has stipulated from a slave for that which Lucius Titius was indebted to him, a Novation takes place, and the thing perishes, because there can be no action against the slave. But in both cases we employ a different rule, affirming that in such a case a Novation no more arises than if by means of the formula, 'Do you promise?' (*spondes*) I had stipulated with a

* L. 1, s. 1, Dig. de novat, (46, 2). Instit. 3, quibus modis oblig. toll. (3, 29.)

foreigner (*peregrinus*) incapable of stipulating by the *Sponsio*.*

The cardinal passage in the "Corpus Juris Civilis" upon the point under discussion, namely, conditions, is found in an extract from the Disputations of Ulpianus.

"Quoties quod pure debetur, novandi causa sub conditione promittitur, non statim fit novatio, sed tunc demum, quum conditio extiterit. Et ideo, si forte Stichus fuerit in obligatione, et pendente conditione decesserit, nec novatio contingit, quia non subest res eo tempore, quo conditio impletur. Unde Marcellus, etsi post moram Stichus in conditionalem obligationem deductus sit, purgari moram, nec in sequentem deduci obligationem, putat. Sed si, quod sub conditione debetur, pure quis novandi causa stipuletur, nec nunc quidem statim novat, licet pura stipulatio aliquid egisse videatur, sed tunc novabit, quum extiterit conditio; etenim existens conditio primam stipulationem committit, commissamque in secunda transfert. Et ideo si forte persona promissoris pendente conditione fuerit deportata, Marcellus scribit, ne quidem existente conditione ullam contingere novationem, quoniam nunc, quum extitit conditio, non est persona, quæ obligetur.†

Secondly.—It is a fundamental rule that the person who is legally entitled to demand payment has power to make a Novation. Hence it is said that solutio is *causa adjecta* for a Novation. Paulus says, "Cui recte solvitur, is etiam novare potest, excepto eo, si mihi aut Titio stipulatus sim, nam Titius novare non potest, licet recte ei solvitur."‡ A further modification of the general rule is given in the words of Pomponius. "Si debitorem meum jussero tibi solvere, non statim tu etiam stipulando id novare possis, quamvis debitor solvendo tibi liberaretur."§ Further, a procurator is bound to act strictly in pursuance of the power (*procura*) delegated to him, hence, as the rule, he is not competent to make a

* Gai. III. 179, Confer. SS. 176-179. (Tomkins and Lemon's Edt.) and the notes thereon.

† L. XIV. pr. s. 1, Dig. de novat. (46, 2) compare also L. 8, s. 1, h. t.

‡ L. X., Dig. de novat. (46, 2.) § L. XXI. Dig., h. t.

Novation; but if he have what is termed a *libera administratio*, that is to say, if he be a *procurator omnium bonorum*, he is competent to create a new obligation by means of a Novation. A *Filius familias* again has no power without the intervention of his tutor to make a Novation. Upon these two last points Paulus says: "Pupillus sine tutoris auctoritate non potest novare; tutor potest, si hoc pupillo expediat; item procurator omnium bonorum."* But on the other hand, if the pupillus possesses a *peculium* with the right of free administration, as it is termed; although he has no power to make a donation of his *peculium*, he can make a Novation. Paulus says, "Cui peculii administratio data est, delegare debitorem suum potest."† Ulpianus says, "Filius familias donare non potest, neque ei liberam peculii administrationem habeat," and then he assigns the reason, "non enim ad hoc ei conceditur libera peculii administratio, ut perdat."‡

Thirdly, every Novation implies that the posterior obligation is distinct and differs from the prior one. The two claims must differ in some respect or the other. If the two obligations were identical it is obvious that the Novation would be useless, and therefore inoperative. The change may be in the subject or in the object; or a condition, or a sponsor, or a term, may be added or taken away. Gaius says—"If the person from whom I make the more recent stipulation is the same, then only a Novation arises, when something new is contained in the more recent stipulation, if perchance a condition, or a term (*dies*), be added, or taken away."* Again, for example, the *object* may be changed. A sum of money may have been stipulated for in the prior obligation, whilst in the obligation created by the Novation a horse or some other object may be promised instead of the money. Or, again, the change may be in the *subject*. There may be a

* L. XX. s. 1, Dig. de novat. (46, 2)

† L. XLVIII., Dig. de peculio (15, 1).

‡ L. VI., pr. Dig. de donat. (29, 5). § Gai. Com. III., 177.

new creditor or a new debtor; or there may be a change in the modality of the obligation, as to the time or place for the solution of the obligation; or, again, in the new obligation there may be what the civilians term a new *causa obligationis*. The prior obligation may have had its *causa* in a delict; the new obligation may be, by virtue of the Novation, made to depend upon contract. Further, the prior obligation may have been based upon a sale, in which case the obligation would be *ex empto*, the new obligation may be based upon a stipulation, in which case it would be *ex stipulatu*. The last would be a good Novation. The following is an example of a Novation created by means of a stipulation—"Quod te mihi ex causa emti centum milia dare oportet, hæc centum milia dare spondes?" to which the reply must be "Spondeo."

Fourthly, a marked and important peculiarity for every Novation in the modern Roman Law is the result of the amendment of the ancient law made by Justinian in the Code.* The effect of this alteration in the law is, that an *animus novandi* no longer suffices; but that every Novation is now required to be made *in expressis verbis*. There can be no *novatio tacita*, nor *præsumta*. Every Novation must be expressly declared. If such be not the case, it is possible that a new obligation may have been created, but there is no Novation of the prior obligation. The consequence is, that there may be two obligations existing by the side of each other, of which the creditor may avail himself *alternatively*. Thus suppose, for example, that words of Novation have not been expressed, as they would have been if A had said, "I promise to give X a horse instead of 50*l.* now due to him;" but an agreement to that effect had been *tacitly* understood to have been made between the parties. Is A indebted to X, under the prior obligation to the extent of the 50*l.*, and liable also to give the horse as well.

* L. 8, (ult.) Cod. de novat. (8, 42).

Certainly not. The rule is that when the intention is clear, and words sufficient to give rise to a Novation have not been spoken, the creditor has an alternative choice: the man in the example given demands either the 50*l.*, on the ground of the obligation first created, or he may claim the horse. In this sense only is there a *cumulative* obligation. For every Novation there must be as it is expressed an "*Animus novandi in expressis verbis.*"

The cardinal passage upon this subject in the Codex, is so important, as containing the latest revision of the law made by Justinian that it is worth while to quote it entire.

"Novationum nocentia^{*} corrigentes volumina et veteris juris ambiguitates resecantes, sancimus, si quis vel aliam personam adhibuerit, vel mutaverit, vel pignus acceperit, vel quantitatem augendam vel minuendam esse crediderit, vel conditionem seu tempus addiderit vel detraxerit, vel cautionem juniorem acceperit, vel aliquid fecerit, ex quo veteris juris conditores introducebant novationes, nihil penitus prioris cautelæ innovari, sed anteriora stare et posteriora incrementum illis accedere, nisi ipsi specialiter remiserint quidem priorem obligationem, et hoc expresserint, quod secundam magis pro anterioribus elegerint. Et generaliter definimus, voluntate solum esse, non lege novandum, et si non verbis exprimatur, ut sine novatione, quod solito vocabulo ἀνοβατεύτως dicunt, causa procedat; hoc enim naturaliter inesse rebus volumus, et non verbis extrinsecus supervenire."*

In this law Justinian clearly says, "that a creditor must especially remit the prior obligation, and must have expressly declared that he has chosen the second obligation before the prior one." Gothofredus, feeling a difficulty in consequence of a supposed contradiction between the closing words of this law with what the Emperor had stated in the previous clause; proposed, upon mere conjecture, a most important variation of the reading given in the text. Sintenis, however, observes, that the alteration is quite unnecessary, and that the meaning of the passage is:—

* L. 8, ult. C de novat. etc. (8, 42).

"That no Novation shall take place except where the will (*voluntas*) shall have specially (*specialiter*) declared such to be the intention; certainly not by virtue of any general legal enactment (*lege*), even though the law may point to a transaction in the nature of a Novation, unless such Novation shall be *expressly declared*."*

We have now, in conclusion, to inquire as to the legal operation of a Novation. When the Novation of an obligation has been effected, the prior obligation is completely extinguished. Thus by the intervention of a new debtor a new obligation arises, and the prior obligation ceases by being transferred to the latter. So effectually does this take place, that although the latter stipulation may be void, the prior obligation is extinguished by the effect of the Novation.†

When several special privileges in the nature of accessory obligations are attached to the prior obligation, as mortgage, guarantee, or other security, these do not, unless by special stipulation, attach to the new obligation created by means of the Novation. The rule of the Roman law is that each obligation *qua sua conditio sequitur*.

There is, however, one important peculiarity to be noticed in the case of a mortgage existing at the time when the Novation of an obligation takes place. If a mortgage has been constituted by means of the prior obligation, and it is expressly stipulated that the pawn shall extend to the new obligation to be created by the Novation; then, the mortgage *with its date* coalesces with, and becomes a part of, the posterior obligation. Though this is perfectly equitable, it is, as Von Vangerow used to observe, quite singular and at variance with what is designated as the *eleganter juris*. It is a departure from what happens in other respects in regard to the conditions and limitations of a prior obligation.

* Sintenis, in his note on the law cited in "Das Corp. Jur. Civ.," Leipzig, 1832.

† L. 3 Instit. quibus modis oblig. tol. (3, 29).

Thus, for example, if A is indebted to X in the sum of 500*l.* on the 1st of January, 1860, and if he at that time mortgages his house to X as a security for the debt, and if on the 17th March, 1871, a Novation of the obligation is effected between A and X, and it is agreed between the parties that the original mortgage shall attach to the obligation created by the Novation, the mortgage will henceforth, with all its incidents, become an element of the new obligation. That this should be the case is a striking and marked peculiarity in Roman law. Thus the mortgage may be very much older in date than the posterior obligation for which it is given. The civilians say when a mortgage has its existence prolonged in this way in union with a new obligation, that there is a "*Successio in sui ipsius locum.*"* Papinianus says:—

"Creditor acceptis pignoribus, quæ secunda conventionē secundus creditor accepit, novatione postea facta pignora prioribus addidit; superioris temporis ordinem manere primo creditori placuit, tanquam in suum locum succedenti."†

There now only remains, as far as the Modern Roman Law is concerned, to notice the case of Novation with what is denominated a "*correal obligation*," and the decision of the States of the Empire upon this subject. In what is termed the strict *correal obligation* it is customary to say that there is "*una et eademque res*"—"una et eademque obligatio." That is to say, there exists but a single obligation which has a single thing whatever that may be for its object. But whilst there is but one obligation, there may be several debtors or several creditors. When a Novation takes place with either of the *correi*, it so operates as to extinguish the the *correal obligation*. Venaleius says:—

"Si duo rei stipulandi sint, an alter jus novandi habeat, quæritur,

* L. 11, S. 1, Dig. de pig. act. (13, 7.)

† L. 3, pr. Dig. qui potiores in pignore, etc. (20, 4.); compare with this L. 12, S. 5, h. t.

et quid juris unusquisque sibi adquisierit. Fere autem convenit, et uni recte solvi, et unum judicium petentem totam rem in litem deducere, item unius acceptilatione perimi utriusque obligationem; ex quibus colligitur, unumquemque perinde sibi adquisiisse, ac si solus stipulatus esset, excepto eo, quod etiam facto ejus, cum quo commune jus stipulantis est, amittere debitorem potest. Secundum quæ si unus ab aliquo stipuletur, novatione quoque liberare eum ab altero poterit, quum id specialiter agit.”†

According to the final decree of the States of the Empire, made in 1654, Novation also now takes place at the moment when the Defendant has completed his answer to what is denominated the “Klagfactur,” or, as we should call it, the “Bill of Complaint.”

ART. VII.—DICEY'S PARTIES TO AN ACTION.

A Treatise on the Rules for the Selection of the Parties to an Action. By A. V. DICEY, of Inner Temple, Barrister-at-Law, and Fellow of Trinity College, Oxford. London: William Maxwell & Son; 29, Fleet Street, 1870.

COULD it be established as a fact that book-making has superseded authorship, at all events in law books, it would nevertheless be a satisfaction to meet with a book which is at least well made. But the remark is an aspersion; there are writers at the present day who may claim the title of authors, and rank with the best of former times. Who, for instance, would venture to dispute the pre-eminent qualities of Hayes as an author? Does he lack the comprehensiveness of grasp which enables a writer to take in the outlines of his domain at a single view? Does the develop-

† L. 31 s. 1., Dig. de novat. (46, 2.)

ment of his subject betray a want of logical symmetry and coherence? Is the skill and subtlety of a trained mind absent in the handling of a recondite dogma? No one would deny that these traits were brought into play in the design, and presided over the execution of his works. Nor does the detail fall short of the plan. There is a lucidity of presentation, a degree of accuracy and finish, as well as a felicity of statement, which is not equalled by any other law writer, not even by Sir William Jones. The style is a triumph of simplification in the thickest jungle of the law, and stimulates the reader by the intellectual vigour which pervades it. Next to Hayes stands Wigram. His treatise on extrinsic evidence fascinates the reader by the luminous distinctness of the thought which it crystallises. Others there are too, like Lord St. Leonards, whom every one recognises as creative minds.

Mr. Dicey's work is essentially a book of practice, and the subject does not admit of the same degree of originality as might be displayed in the less formal parts of the law. It is therefore a surprise, as well as a pleasure, to find how much freshness of thought he has brought to bear upon a topic, apparently so artificial as the parties to an action. Unlike many other writers, he does not re-echo the sayings of a judge, and make the columns of his book resound with platitudes which should have died in their birth, and not lived to haunt succeeding ages. He states the law at times in the language of the courts when it is apt, but he also presents the principle in his own language, and frequently according to the different aspects in which it might strike the mind. This variety of presentation gives the reader a grasp of the principle in the extent of its application, which he would not otherwise have been enabled to realise; and this is an indication of the suggestiveness of the author. It discloses a mind trained in the handling of general principles—an education which unfortunately does not always precede a professional career. As an illustration of the method

employed to vary the statement of a principle, take the case of a set off in an action either by the husband and wife or by the husband alone. After mentioning the instances in which set off is allowed or refused, Mr. Dicey proceeds:—

“To put the same thing in a different form, when a husband sues in his own name, the action is treated as one brought by him, and against his claims in such an action debts cannot be set off which are due, not from him but from his wife. When, on the other hand, the action is brought by the husband and wife, it is considered as one brought by her, though the husband's name must be joined for the sake of conformity, and therefore debts due from her can, and debts due from him cannot, be set off.”*

This paragraph embodies in a different version the principle that set off avails against the party whose interest or right is involved in the particular action. The rule that a seal imports a consideration, although stated, is at the same time expressed in novel terms, which arrest the attention, and impress the significance of the rule upon the memory; it is thus turned—“A covenant is good without the existence of any consideration to induce the covenantor to enter into the covenant.”†

Mr. Dicey discloses his faculty for general reasoning in the neat discrimination which he makes in a subject which has been confused by the common lawyers. He apprehends and explains the difference between a tacit and an implied or *quasi* contract. The manner in which he treats the distinction indicates that he is familiar with Austin, who detected the ambiguity involved in the phrases, and severed it with a blow of his sledge-hammer-mind for ever.‡ There are traces in the book of familiarity with other authors who are not quoted. The subject of possession is handled with remarkable precision, and the delineation implies an acquaintance on the part, either of the judges who observed

* Page 185. † Page 101.

‡ 3 Austin's Jurisprudence, 221-4, 133, 136.

the distinctions, or of Mr. Dicey, who has stated them, with Savigny's *Recht des Besitzes*.*

Mr. Dicey's method of developing a special subject is simple, and, if made in subordination to the leading principle, according to which the exceptions as well as the general rule are determined, is calculated to furnish a knowledge of the extent of the rule in application, which is the grand object of attainment. It is the acquaintance with the precise limits of a rule, and an apprehension of the shadow-lines of demarcation which prevent its application, that distinguishes the trained lawyer from the layman or unpractised thinker. It is easy to illustrate the manner in which the information is conveyed to the reader. Thus the rule is stated that the principal must sue on a contract made by an agent on his behalf, and examples are set forth which show how the rule is applied and how it works in practice. Then the exceptions are stated and exemplified in like manner, and in explanation, though not with the distinctness and emphasis to which, by its importance, it is entitled, the principle which justifies the exceptions as a class is enunciated. The agent in all the enumerated instances had been dealt with as a party to the contract. The reason which empowers the principal alone to sue, because the agent was a mere instrumentality to effect a purpose conceived by the principal, ceases to operate; the agent himself becomes a party to the contract, and is naturally invested with the rights and duties of a contracting party. This illustration shows that the principle which dictated the rule applies to the exceptions as well. The contract is not exclusively for the principal, it is also for the agent, who becomes *pro tanto* a principal. The exceptions in strict language are said to prove the rule. Another illustration will perhaps bring out the connection between the exceptions and the rule still more significantly. Thus the rule is that in a suit upon a joint contract all the

* Pages 333-7, 338 n (u), 358 n (c).

co-contractors must be joined. The exceptions include bankrupts, debtors protected by the Statutes of Limitation or domiciled without the jurisdiction, common carriers where the action is severed by Statute, nominal or dormant partners, and infants or married women.

“In the first five cases the plaintiff *may* join the persons whom he is not compelled to join as defendants, and the only harm he can suffer is, that in some of these cases, *e.g.*, where the defendant joined is bankrupt, or is protected by the Statutes of Limitation, he will fail in his action as against such defendant. In the sixth case the plaintiff *must not* join the person, *se*, the infant or married woman whom he cannot be compelled to join as a defendant, for the joinee of such infant, or married woman, will, if properly pleaded, make the action fail, not only against such person, but also as against all the defendants.*

The reason for joinder is removed, because the liability of the party on the contract is taken away, and he has ceased to be a co-debtor. In the last instance, the infant or married woman never was a co-contractor. A disability to contract is an incident of their condition, and, although they might go through the form of making a contract, the law would not recognise it as binding. It is obvious, therefore, that the rule and the exceptions rest upon an identical principle. It is the liability on the contract which is the test of joinder; the rule assumes such liability from the fact of the contract, and the exceptions explain the cases where no actual though an apparent liability exists.

It is not meant by these remarks to question the propriety of laying down rules, and subsequently pointing out the exceptions. The method has been tested by experience, and found to be an available means of instruction. The objection is that a somewhat artificial and formal mode of tuition is employed as a self-subsistent course, instead of as merely an aid to bring out into prominence the principle

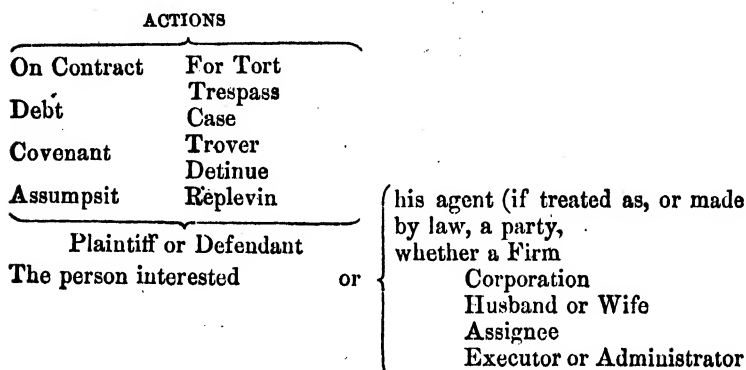
* Page 233, note (t).

which governs both rule and exceptions. Some assistance is required by the mind in order to enable it to grasp and hold an abstract proposition, and it should be the object of any method to supply this requisite. Let the Germans indulge in abstractions which they are pleased to consider profound; the rest of mankind assuredly thinks they have mistaken obscurity for depth, unless it be that they can dive deeper and come up dryer than any other mortals. A generality by itself conveys no meaning to the mind, it must be converted into actuality and illustrated by examples before it is apprehended. An amusing incident occurred to the writer which convinced him of the unmeaningness of a "glittering generality." He was, during the [past winter, out on one occasion skating, and he was attracted by a friend who was devoting his mind and body to cutting an intricate figure on the ice, and thinking it would be interesting to understand the movements involved in the process, he asked his friend to do the feat again, and do it slowly, so that he could follow the movements in detail. His friend, however, proud of his achievement, replied in a grand and triumphant manner, "It is merely a question of the centre of gravity, my dear fellow, the attraction of gravity," and round he whirled. With a dim idea of how to apply that valuable discovery of Newton to a complicated evolution on skates, the writer turned away and tried figures with which he had become familiar without any such luminously profound explanation. He was solaced shortly afterwards at the sight of his philosophical friend flat on his back, and it occurred to him that perhaps the attraction of gravity would also account for that phenomenon. This digression, if it be one, shows that a general proposition must be interpreted to the mind by the help of intermediate propositions, which serve as steps to enable the understanding to mount up to the general theory, and view it abstractedly.

It seems to be a fault of Mr. Dicey that in the pursuit of details he has lost sight of the object for which his rules and

exceptions are designed. They are useful, if not necessary, supports for the principle which rests upon them, but to erect piers without any bridge to span the intervening space would hardly be acknowledged as good architecture. Nor is this defect confined to the separate subjects in the treatise; it is, on the contrary, the radical vice of the book as a whole. The first impression of the reader is that the work is fragmentary. There is no comprehensive outline which stamps itself upon the mental retina, and thereby enables the mind to group the various fragments together, and retain them in the memory. With such an accumulation of cases the demand for a sketch of the plan upon which they are classified becomes imperative, and unless it is furnished the book loses its character of a treatise, and descends to the rank of a digest, which is not designed to be read, but merely to be consulted on the occasion of doubt. The arrangement, or rather the division of the book into rules, which are numbered, and run through the entire volume without discrimination as to the subjects thus catalogued, is worse than useless; it is distracting. It aggravates the difficulties of obtaining, if it does not altogether frustrate the attempt to gain, a general view of the subject, with a due subordination of the parts. There is a natural order in every structure, and this should by all means be preserved. What would be thought of an anatomist who, in explaining the workings of a human skeleton, should take the bones of a man and place them in a row, head, hands, feet, and backbone, side by side, in numerical order, and expect his pupils to understand by that disarrangement the action of the human frame? It is none the less grotesque to ask a law student to restore a system which has been shattered into pieces, where the fragments are presented to him without any model to guide him in reconstructing the frame-work. The rules should have been subordinated to the titles which they are designed to elucidate. If grouped under the head which they interpret, and if they disclose with sufficient clearness the principle which they are intended

to illustrate and embody, the part is complete. The titles should then be arranged in an order which will show their connection with the subject, and an epitome of the work should be given in the form of a diagram to facilitate the comprehension of the scheme. Thus, to make a rough sketch, take the following plan :—



Such a design could be extended by a brief statement of the principles involved in each separate title, and the reader, with this bird's-eye view of the territory, would understand the lay of the country which he travelled over. This is important in order to counteract the effect of the formal division of the book into actions: (1st.) By plaintiffs on contracts; (2nd.) Against defendants on contracts; (3rd.) By plaintiffs for tort; (4th.) Against defendants for tort.

Apart from the criticism upon the arrangement of his book, Mr. Dicey deserves commendation. He elucidates a topic with ease and simplicity, and it is refreshing to follow the neat summaries of recent cases which he recapitulates. The delineation is accurate, and the substantial distinction is well drawn, and presented. The cases are familiar acquaintances, and it is agreeable to meet them again, and so pleasantly associated together in society. Most of them are recent decisions, and this feature makes the book seem very modern, and gives it the attractiveness of a review article;

not that it is flimsy in texture, far from it. The material is vast in bulk, and is worked up with minute conscientiousness into a compact and solid mass. The wonder is that a book which contains such an accumulation of cases, and information valuable for practical application in every line, could be read by any one except a legal ostrich or anaconda. The secret of the mystery is the simplification of the subject by a singularly facile and direct mind, which neglects no means to disentangle the intricacies of a subject and straighten it out. The device employed to relieve the attention from any details in the statement of a case, except such as bear upon the point in discussion, and to give at the outset a clue to unravel the complication, is as ingenious as it is simple and successful. The mind is not encumbered with circumstances, and knows at the first glance how the parties are going to stand towards each other. It is rendered free by this preparation to devote itself to the single point involved, which it seizes with interest, because it has not been previously fatigued by the unnecessary labour of mastering the details. The economy of intellect by this simple process is prodigious, and its inventor deserves the gratitude of every lawyer, as it saves him from drudgery, and enables his mind to work without friction. The improvement is to turn the letters, which in the statement of a case represent persons, into expressive language. The designations John Stiles and Thomas Nokes did not, even before they became antiquated, convey any meaning, though in the civil law *Aulus Agerius* and *Numerius Negidius* did signify something. Thus Mayntz says:—"On s'aperçoit que le mot *Agerius* désigne celui qui agit, et *Numerius Negidius* celui qui doit payer, *numerare*, et refuse de la faire, *negare*."*

The first letters of the alphabet indicate the plaintiffs, and the last the defendants. An illustration will show how Mr. Dicey employs the letters, and at the same time serve as an

* Droit Romain, s. 132; Des Actions, n. 76, ed. 1856.

example to display the neatness with which he extricates a knotty point from embarrassment, and simplifies the subject. He describes the mode in which a novation is effected by delegation, or the substitution of a new for the old debtor, thus :—

“Suppose X owes M 100*l.*, and M owes A 100*l.*, and the three meet, and it is agreed between them that X shall pay A the 100., M's debt is extinguished, and A may recover the sum against X. In a sense, such a transaction involves the assignment of a chose in action, since the claim of M against X is transferred to A. But there is in reality no exception to the general rule; for A sues X, not on the original contract between M and X, but on a new contract between A and X, the consideration for which is the extinction of A's claim against M, *i.e.*, of M's debt to A. There must, therefore, be an agreement between all the three parties. The intermediate debt, *i.e.*, the debt due from M, the assignor, to A, the so-called assignee, must be extinguished. For though, where by an agreement between the three parties A undertakes to look to X, and not to M, his original debtor, A may maintain an action against X on this agreement, yet, in order to give A the right to such an action, there must be an extinguishment of the intermediate debt, *i.e.*, the debt due from M to A. There must also, at the time of the assignment, be a debt actually due to M, the assignor, from X, the ultimate debtor. The whole transaction is in effect the making of a new contract, and the right of the assignee depends in reality not upon the assignment of the assignor's claim, but upon a new agreement entered into by all the three persons concerned in the transaction.”*

But A may have a right to sue X in consequence of an agreement between M and X to which he was not a party, if he be the sole person in interest; and it is important to understand distinctly the reason which entitles a person beneficially interested in, though not a party to, a contract, to sue upon it, as the principle not only classifies a large congeries of cases, but also extends beyonds them and determines whether an assignee may use at his volition the name

of a covenantee for his own benefit. The rule is, that where a person beneficially interested, though not a party, could sue if the transaction were a simple contract, he may use the name of the covenantee if the agreement is under seal. This extent of the principle is not stated by Mr. Dacey, nor does he bring out the cause of action in its general application, though it might have been expected from him after the discriminating analysis which he made in the special instance cited. The acuteness which he exhibited in handling that case raised an expectation for the discovery of the principle which underlies all the cases. He almost reached the clue to a solution of the difficulty when he discarded the consideration as a test.* Had he taken a step in advance, and said that the sole person in interest could sue whether he were a party to the contract or not, he would have completed his analysis with equal discrimination. The extinction of the original debt in the one case, and the appropriation of the fund in the other,† are merely *indicia*, to show that the original party has ceased to be interested in the contract, and that the person beneficially interested is the only one left to avail himself of the contract.

There are many points of law stated in the treatise which invite discussion, but, as a review article is not adapted to a detailed investigation, they must be passed over with the remark that the talent displayed in detecting and portraying the nicer shades of distinction, which ordinarily escape observation, deserves, as it will receive; ample appreciation.

* Page 94. † Pages 93-101.

ART. VIII.—MR. DUDLEY FIELD ON THE NEW YORK CODES.

WE are glad to see that Mr. David Dudley Field has entered the arena in defence of his own production, the Codes of New York. These Codes have lately been subjected to a good deal of unfavourable observation, and we rejoice that their defence has been taken up by so able and competent a champion as Mr. Field. Mr. Field's letter to some members of the Californian Bar upon this subject is printed in full in another part of this number. We need not therefore attempt a description of it here. But inasmuch we have ourselves criticised the Codes of New York at some length (see *ante*, Vol. XXVII., p. 312; Vol. XXVIII., p. 1; Vol. XXIX., p. 1), it may be well that we should offer a few remarks upon Mr. Field's defence of those Codes.

Mr. Field's letter may be divided into two parts—an argument in favour of codification in the abstract; and a plea for the Codes of New York in particular. Upon the first point we are at one with the writer. Mr. Field complains of critics, whose hostility to the Codes of New York goes hand in hand with hostility to codification in general. We at least are not of this number. On the contrary, we are, and always have been, emphatic advocates of codification. Our position is that a code ought to be a good code, and that a good code can be made, and has been made; but that the Code of New York is not a good code, and therefore ought to be rejected. We have examined Mr. Field's letter, in order to see what reply he makes to this objection, but we regret to say that we remain unconvinced.

Mr. Field concerns himself with two of the five volumes which together compose the Code or Codes of New York, *i.e.*, the Code of Civil Procedure, and the Civil Code. In defence of

the Code of Procedure he relies upon its acceptance and enactment by the State of California, and (in part) by that of New York. Now it happens that very unfavourable opinions of this Code have been expressed in New York itself, as is shown in the article contributed to our last number by "an American lawyer." But, without dwelling on this, we must observe that such a partial acceptance of the Code of Procedure, as above mentioned, hardly meets our objections to it. Such an acceptance proves only, at the most, that the system of procedure, embodied in the Code, is thought to be superior to that in whose place it is introduced. This we are not concerned to deny. We may concede to Mr. Field that the procedure embodied in the New York Code, imperfect as it is, is yet superior to the confused and complicated system existing alike in this country and in most of the States of America, with its separation between Law and Equity, &c. But this change may be effected in many ways, and it may be effected by a good code, as well as by a bad one. Our charge against the Code of Procedure is that it is a bad Code; in other words, that although the principles of the work are good, the execution is highly defective. Upon this point we may repeat some observations previously made by us upon this subject (*ante* Vol. XXVII., p. 323):—

"We have no doubt that the system established by the Code is superior to that which preceded it, nor have we discovered anything which would lead us to suppose that the principles of procedure laid down by the Code are in anywise mistaken. We do, however, venture to think that experience has shown that the Code itself was not well executed, that its various sections were not drawn with sufficient skill, or fitted together with sufficient care."

Our principal ground of objection to the Code of Civil Procedure is that within sixteen years it has given rise, within the State of New York alone, to fourteen amending Statutes,

and 6000 reported decisions. To this charge Mr. Field makes no reply.

For further observations upon the Procedure Codes, we may refer to our former article (*ante* Vol. XXVII., p. 312). We pass on to the consideration of the Civil Code, the defence of which occupies the most important portion of the letter before us. Mr. Field speaks very lightly of most of the objections to the Civil Code, as "relating chiefly to verbal corrections and matters of detail." We can hardly agree with him in regarding "matters of detail" as unworthy of consideration in a question of this kind. To a practical mind the details of legislation are always important. The intention of a law may be good, but it may be so badly expressed as to become positively mischievous. In the present case it will not be disputed that in the execution of a code, the care and skill with which it is constructed, is a matter, not of secondary, but of primary importance. We have elsewhere (*ante* Vol. XXIX., pp. 11 *et seq.*) expressed our reasons for condemning the execution of the New York Civil Code. One instance must suffice us now. S. 1259 of the Civil Code enacts as follows:—

"An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases and in no others:—

"(3.) When it is the *usage of the place* to delegate such powers."

What place is here meant? The place where the agent resides, or the place where the principal resides? The place where the contract of agency is entered into, or the place where the acts in question are to be done? It would be difficult to say. The addition of three words would have made the meaning clear, and would perhaps have saved a score of lawsuits, and an indefinite waste of money.

We pass on to another equally serious objection which has been urged against the Civil Code, *i.e.*, its extremely meagre and incomplete character. This charge Mr. Field denies, and proposes that his critics should, in order to prove their

case, put into words what they would have had inserted in the Code. This is equivalent to desiring them to make a code for themselves, a task which we must decline. If, however, Mr. Field wishes to learn his own shortcomings, we recommend him to compare the Indian Code of Succession (Act 10 of 1865) with the corresponding portion of the New York Civil Code. He will thus have the advantage of seeing at once what a code should be, and what his own code is not. Meanwhile we may remind him that the following subjects (amongst many others) are entirely, or almost entirely, omitted from the Civil Code, viz., charities, (the whole law relating to this subject), equitable waste, lights, constructive notice, the renewal of leases, the powers of trustees for sale, the right of a beneficiary, to whose prejudice a breach of trust has been committed, to follow the property wrongfully substituted for the trust estate; the powers of trustees to vary investments, and the nature of the securities upon which they may invest the trust property; the circumstances in which, *from the nature of the case*, specific performance of a contract cannot be decreed, as where the court has not the means of enforcing its decree; the position of a tenant for life, as a *quasi* trustee for the remainderman, &c. All the above branches of law (with many others) are omitted from and will therefore be unaffected by the Civil Code. We submit that a code which is thus fragmentary and meagre in its character is powerless for good, though it may be prepotent for harm.

Mr. Field further endeavours to show that the New York Code is not shorter than the Code Napoléon, or the Codes of Sardinia, Russia, and Austria. Now we do not desire to institute comparisons between the Code Napoléon and that of New York. It is probable that the former greatly surpasses the latter in point of excellence. But we must remind Mr. Field that the most competent judges, such as Mr. Austin, have regarded the Code Napoléon as a very crude and imperfect piece of legislation. That

Code has, moreover, failed to preclude the necessity of referring to the previously existing law, and has equally failed to prevent the growth of an enormous mass of explanation and commentary, which approximates to the bulk of English Statutes and Reports. As to the other Codes mentioned by Mr. Field, no one, so far as we are aware, has ever held *them* up as models of legislation. And even if Mr. Field could demonstrate that the New York Code is equal in all respects to the Code Napoléon (which we apprehend he would have great difficulty in doing), the reply would be that we want for this country a very much better code than the Code Napoléon. Nor is this a dream altogether unrealized. The completed portions of the Indian Code* (to which we observe Mr. Field does not allude) are in our opinion unquestionably superior to any piece of legislation with which we are acquainted, and it is with the Indian, and not with the French Code, that the Code of New York should be compared.

To continue the discussion further would be to repeat what we have already said elsewhere. We have already examined the New York Codes at length,† and have been reluctantly compelled to pronounce an unfavourable opinion of them. Nor is there anything in the letter before us which induces us to qualify that opinion. Mr. Field's arguments might have some weight if the New York Code were the only code in the world, and there were no possibility of constructing another. But this, happily, is not the case. The practical question for Englishmen may be stated thus—It is generally admitted that we shall, sooner or later, have a code in this country. If then the New York Code is a good one, the work is already done for us. We have little to do, except to introduce the New York Code as it stands. But we have endeavoured to show that the New York Code is not a good code, and that to introduce it into this country would be utterly futile and mischievous. Rejecting this course, we may yet

* As to this, see *ante*, Vol. XXIX., p. 197.

† *Ante*, Vol. XXVII., p. 312; Vol. XXVIII., p. 1; Vol. XXIX., p. 1.

look abroad in search of models, upon which to construct an English Code. In so doing, two codes are especially presented to our view, the Indian Code, and the Code of New York. Which of the two shall we select as a guide? We have no hesitation in replying, the former.

ART. IX.—JUSTICES PROCEDURE (ENGLAND)
BILL.*

LORD CAIRNS, on moving the second reading of this important measure of law reform on the 20th of March last, stated †:—

“ That its object was to consolidate the existing Acts which regulated the procedure and practice of Magistrates’ Courts and Petty Sessions Courts in England. There was, he was told, not less than a thousand of these courts, and considering the number of persons interested in them, and the number of cases, small in themselves, but important as regarded their consequences decided by them, the House would see the desirability of collecting in one Statute the whole of the law and procedure applicable to such tribunals. He believed the only attempt of the kind which had been made was the Acts generally known as Jervis’s Acts, which were passed nearly a quarter of a century ago. These Acts were incomplete and imperfect in many points of detail, and various circumstances had since necessitated alterations, both in the law and procedure of the courts. In recent years, a consolidation of the law in this direction had been accomplished in Ireland and Scotland, and the present Bill was originally introduced into the other House in 1865, but after it had made some progress, the state of public business necessitated its withdrawal. Considerable attention had since been paid to it with

* “ To consolidate and amend the Acts regulating proceedings before justices of the peace out of Quarter Sessions in England ” (as amended on Report, 31st March, 1871).

† Vide *Times* of 21st March, 1871.

the view of making it more perfect. Their lordships would not expect that he should claim to be its author, but it might be satisfactory to them to know that it had been prepared under the superintendence of Mr. Oke, the chief clerk of the Lord Mayor's justice room at the Mansion House, who was well versed in the subject, and had had large experience, both in that Court and other Petty Sessions Courts in the country, in matters of this description."

No one, who has had any experience in the business of Petty Sessions, or in the working of the Acts known as Jervis's Acts, 11 & 12 Vict. cc. 42, 43, passed in 1848, whether as counsel, attorney, or party, can doubt the need of a Consolidated Procedure Act, applicable to all cases before justices, or that those Acts (notwithstanding the Lord Chancellor's observations) did not consolidate "all the then existing Statutes respecting magisterial jurisdiction;" that they are very imperfect measures; that their provisions are inapplicable, both from express exception as well as from the nature of the procedure, to a numerous class of cases arising before justices; and that there are numerous other defects and shortcomings in them (some of which have, in consequence, been specially provided for in subsequent scattered provisions) which are possibly not known to officials in high places, or to the Home Department.

The important reform proposed to be effected by this Bill has been often before referred to in these columns,—amongst others, in 1862, when a valuable Paper on "Magisterial Procedure,"* was before the Social Science Association, which attracted much attention at the time; in 1865, when the Bill referred to by Lord Cairns was before the House of Commons.

The matter was before the Statute Law Commission in March, 1857 (nine years only after the passing of Jervis's Acts), when that Commission resolved that a Consolidation

* "Magisterial Procedure; Reasons for its Revision, Simplification, and Uniformity," read by Mr. Oke at the Social Science Congress at the Guildhall, London, June, 1862 (*Transactions of the Association*, p. 146.)

Procedure Bill, "upon the principle of Jervis's Act, 11 & 12 Vict. c. 43, but extending to *all* cases of summary conviction and to *all* necessary proceedings before justices," should be prepared; and instructions were afterwards given for such a Bill, and it was partially proceeded with by Mr. Macnamara, under the direction of Mr. Greaves, Q.C., but that Commission expired before its completion. Whatever Mr. Macnamara did on that occasion was, it is understood, handed to Mr. Oke as the most fit person to complete and carry out. Mr. Greaves, however, in the introduction to his edition of "The Criminal Law Acts, of 1861" (pp. xxviii and xxix)—those Bills having been prepared under his superintendence—expresses his regret that a complete General Act as to procedure had not been passed before those Acts were drawn, so as to simplify or omit the procedure clauses contained in them.

During the period which has elapsed since the passing of Jervis's Acts—now twenty-three years—the criminal and civil jurisdiction of the magistracy has nearly doubled, and is yearly increasing; in fact, the Petty Sessions is becoming of greater importance, by the addition of new functions being placed within its cognizance in each Session of Parliament; yet, although the magistrates' jurisdiction in Ireland and Scotland is not so extensive or important as in England, each of those parts of the kingdom has a Consolidation Procedure Act, one in 1851 and the other in 1864.*

The legal journals have, on several occasions, advocated a consolidation and amendment of the procedure; and the Bill of 1865 had likewise the cordial support of a large number of the acting borough and county magistracy, of the Justices' Clerks Society, and of the Jurisprudence Committee of the Social Science Association.

These facts and reasons appear to us to furnish abundant grounds, apart from the larger and general question of con-

* Ireland, 14 & 15 Vict. c. 93; Scotland, 27 & 28 Vict. c. 53.

solidating the Statute Law, for the introduction of a general measure applicable to the procedure in all cases before justices out of Quarter Sessions; and we can only express our surprise that the subject has not before been taken up by the Government. This arises, probably, from the fact, that the law officers of the Crown have not sufficient time amidst their other duties to go thoroughly into such a subject, in order to frame a new or amended procedure, neither has the Home Office a staff to master such details, nor can a parliamentary draftsman be expected to be possessed of the practical knowledge necessary to the preparation of a measure of the kind; and for this purpose no one in this country is, probably, more competent, both from his large experience, as well as his literary acquirements, for such a task than the author of "The Magisterial Synopsis."

As to the Bill itself it will be sufficient for us in these pages to state that it is of a very comprehensive character, necessarily of considerable length (131 clauses with schedules), but not complicated, and bears evidence of much care and thought having been expended upon it, both in its arrangement and composition, particularly as far as the retention of the language of the old Acts has been found necessary to be followed. It is divided into fourteen parts, viz:—I. Preliminary; II. Jurisdiction and Authority of Justices; III. Preferring Complaints and Charges; IV. Process to enforce Appearance of Defendants or Accused; V. Witnesses; VI. Adjourning and remanding Cases; VII. Place of Hearing and Proceedings thereat; VIII. Summary Jurisdiction in respect to Offences and other Matters; IX. Preliminary Examination in respect to Indictable Offences; X. Summary Jurisdiction over certain Indictable Offences; XI. Convening and holding of Special Sessions; XII. Execution of Warrants; XIII. Taking, recording, and estreating Recognizances; XIV. Miscellaneous Provisions.

The Bill is prefaced by a "Memorandum" of eight pages, which, amongst other matters, shows the several changes and

new enactments proposed by the Bill, from the parts of which we extract the following:—

“I.—The procedure proposed by this Bill being uniform as far as practicable as to all cases within the justices' jurisdiction, and in many instances similar to those in the Irish and Scotch Acts (14 & 15 Vict. c. 93, 27 & 28 Vict. c. 53), the Acts and sections necessarily proposed to be repealed are:—Jervis's Acts (11 & 12 Vict. cc. 42, 43); the Special Case Act (20 & 21 Vict. c. 43); Stipendiary Justices Act (21 & 22 Vict. c. 73); the Criminal Justice Acts (18 & 19 Vict. c. 126, and 31 & 32 Vict. c. 116, s. 2); the Juvenile Offenders Acts (10 & 11 Vict. c. 82, 13 & 14 Vict. c. 37, and 25 Vict. c. 18); procedure clauses in the Railway Clauses and other Consolidation Acts of 1845, the Acts 12 & 13 Vict. c. 14, and 25 & 26 Vict. c. 82 as to recovery of parochial rates, the Criminal Law Consolidation Acts of 1861 (24 & 25 Vict. cc. 96, 97, 99, 100), in the Metropolitan and City of London Police Acts, and also in other Acts relating to the summary jurisdiction and special sessions matters.

“II.—Provisions defining jurisdiction and powers over offences and matters of all descriptions of justices; when they shall be disqualified from determining cases by reason of interest, relationship to the parties, &c.; and when capable of acting as members of corporate or local bodies, &c.

“III.—Allowing a more simple mode of making complaints and charges for summary and indictable cases and issuing summonses; by whom complaints may be made; limiting the period for recovering local rates (now without limitation) to twelve months from their dates; empowering any justice in the United Kingdom to take the deposition of a witness as to an indictable offence for use elsewhere on making a charge against an accused.

“IV.—Allowing service of summonses and orders to be at office or place of business of parties; also proof of service thereof at a distance to be made by a statutory declaration, thereby obviating the necessity for constables being taken from their duties to attend the Petty Sessions solely to prove such service.

“V.—Giving power to summon witnesses for either party, wherever resident, and to produce documents; power to summon material

witnesses to give evidence for the prosecution before a complaint completed for an indictable offence.

“VI.—Clerk to justices to adjourn Petty Sessions where requisite number of justices do not attend and order detention of accused for 24 hours if no justice procurable to bail person in custody on a warrant; justices may in indictable offences bind over witnesses to appear on remand day.

“VII.—Providing for the appointment of a permanent chairman of Petty and Special Sessions, and for the hearing of certain cases out of Petty Sessions; justices may fine or commit for contempt of court; proceedings not to be prejudiced by death of prosecutor; summary committal for perjury before a single justice, being an extension of 14 & 15 Vict. c. 100, s. 19; enacting that *ex parte* applications for process shall not be heard in open Court.

“VIII.—Defining the cases to which the summary jurisdiction shall apply, thereby extending the 11 & 12 Vict. c. 43, which omitted such cases from its operation, and applying this part to cases where no provision is made in any Act as to procedure. Power to hear cases on voluntary appearance of defendant; by consent of parties one justice to hear where two are required; time for objecting to jurisdiction of justices, and course to be taken by justices on allegations of claims of right or title defined; mode of hearing, division of opinion amongst justices, &c. :

“Special powers of adjudication given:—To impose the full amount of penalty, &c. upon each offender where two or more are concerned in the offence; to mitigate penalties and terms of imprisonment; to substitute imprisonment in gaol for the stocks; to permit sums, as distinguished from penalties, to be paid by instalments; to punish male offenders under sixteen years of age, liable to imprisonment for an absolute term, by whipping; to impose consecutive terms of imprisonment in those cases which are not provided for by 11 & 12 Vict. c. 43, s. 25; power to award compensation for hurt or damage done in committing an offence; distress for penalties, &c., to issue at discretion of justices; power to award hard labour for offences; amends may be ordered for frivolous complaints; providing an uniform and proportionate scale of imprisonment in default of payment of all penalties, sums, and costs, thereby

extending the scale in the Small Penalties Act, 1865 (28 & 29 Vict. c. 127), from 5*l.* to sums of 50*l.* and upwards :

“Substituting a record or ‘register of decisions’ in each district of Petty Sessions for the present long and formal convictions and orders which in future are not to be filed with the clerk of the peace, as this record, or a certified copy of an entry in it, is proposed to be evidence of a conviction or other decision :

“Allowing an appeal in the cases now allowed, and in most others, from any justice’s decision, upon the facts or law to the Quarter Sessions, as in the Irish Act, 14 & 15 Vict. c. 93, s. 24, the Metropolitan Police Courts Act, 2 & 3 Vict. c. 71, s. 50, and the Larceny Consolidation Act, 1861, 24 & 25 Vict. c. 96, s. 110 (Jervis’s Act, 11 & 12 Vict. c. 43, containing no provision whatever as to appeals, except the recovery of costs certified by the clerk of the peace), and in all cases upon the law only to a superior court, as now permitted by 20 & 21 Vict. c. 43 ; with uniform provisions as to time of appealing, notices, recognizances, enforcing the judgments thereon, &c., in each mode of appeal :

“Providing an uniform mode for the application of penalties to the superannuation, county, or other funds, informers (not being constables), &c.

“IX. Providing an improved procedure on the preliminary examination for indictable offences, now regulated principally by 11 & 12 Vict. c. 42 ; for receiving evidence of witnesses called for an accused, hearing his defence, and perpetuating testimony, &c., as in 30 & 31 Vict. c. 35, ss. 6, 7, and also giving further facilities for bailing accused, and his surrender by his sureties in case of his being about to abscond.

“X. Extending the present summary jurisdiction over certain indictable offences of larceny and embezzlement, given by the Criminal Justice and Juvenile Offenders Acts (18 & 19 Vict. c. 126 ; 31 & 32 Vict. c. 116, s. 2 ; 10 & 11 Vict. c. 82 ; 13 & 14 Vict. c. 37) to other larcenies and frauds, &c., when the accused consents to the summary jurisdiction, which latter offences now either go unpunished, or are sent for trial where the grand juries complain of such cases being brought before them ; also enacting an uniform and more simple procedure in Petty Sessions, than now exists under those Acts.

“ XI. Dispensing with the services of high constables in relation to *all* special sessions (except in the metropolitan police district), as intended by the High Constables Act, 1869 (32 & 33 Vict. c. 47); providing an uniform mode of appointing special sessions, and also of convening them in lieu of the present circuitous one through the high and petty constables; and giving general powers of adjourning and holding special sessions, &c.; providing for a seal being impressed on licences, certificates, &c., as allowed by the Beerhouse Act, 1870 (33 & 34 Vict. c. 29, s. 4), instead of the signatures of the justices.

“ XII. Providing that all justices' warrants may be executed anywhere in England, without being indorsed where executed, like those of the metropolitan police magistrates, may now be under 2 & 3 Vict. c. 71, s. 17, and as enacted in the Scotch Summary Procedure Act, 1864 (27 & 28 Vict. c. 53, s. 8), the present practice of getting warrants backed being a great hindrance to their execution.

“ XIII. Providing an uniform mode of taking and recording recognizances; also a summary mode before justices of estreating recognizances for appearance of parties at Petty Sessions, as well as recognizances to keep the peace and be of good behaviour (without going to the Quarter Sessions or requiring the aid of the sheriff), as allowed in the metropolitan police courts in certain cases and in Ireland.

“ XIV. Providing a comprehensive series of short and consolidated forms for the use of justices and others in all cases, and not, as now, for each class of case or crime within a magistrate's jurisdiction, thereby reducing the number of the forms necessary to be used by at least one half of those now provided by the several Acts.

“ Many of the general provisions of the Bill have, after communication with the solicitors of the revenue departments, been extended by clause 131, in terms suggested by them, to revenue cases which were excepted from the operation of the 11 & 12 Vict. c. 43, and 14 & 15 Vict. c. 93.”

To enable any person to make a critical examination of the measure, and to ascertain the way in which the old Acts are dealt with, the Bill has prefixed to it a “ Compa-

rative Table of repealed Acts and new Provisions," showing at a glance where the re-enactments or new provisions for those repealed are to be found in the Bill, or the reasons for their omission.

ART. X.—THEORY OF APPELLATE JURISDICTION.

WHEN any particular reform of the law is contemplated, it is often convenient to test the merits of the proposed reform by reference to first principles. The High Court of Justice Bill and the Appellate Jurisdiction Bill which were lost last Session do not seem likely to be revived during the present Session; but we shall probably hear of them again before very long.

The present, therefore, seems to us a convenient time for considering some of the questions involved in these Bills with reference to first principles.

Why should an Appellate Court ever exist? If Court O, the court of original jurisdiction, is competent to decide questions brought before it, why should there be an appeal thereupon to Court A, the court of appellate jurisdiction? If, on the other hand, Court A is clearly a more competent tribunal than Court O, why should the question ever have been brought before Court O? It is important, we think, to put this objection, although a reply to it may be made without difficulty. For, we conceive it important that care should be taken, in constituting an Appellate Court, to limit its functions in accordance with the reply to be given to the above question. In other words, care should be taken first to examine what are the proper functions of a Court of Appeal, and then to prescribe its constitution and jurisdiction, so that it may most efficiently perform and not exceed those functions.

To the objection above suggested we may reply as follows :

The principal object of an Appellate Court is to revise the law as laid down by the court below. An Appellate Court, therefore, ought to be, and generally is, composed of lawyers of the first eminence. But a court of original jurisdiction has in general a vast quantity of ministerial duties which it is perfectly competent to perform, and is, in general, more competent to do so than the Court of Appeal would be. Certainly if the judgments of the inferior court were appealed from as often as they were given, and when appealed from were just as likely to be reversed as to be affirmed, such a system would clearly be absurd and indefensible. It would become evident that either superior or inferior court was unfit for its business. But the mere fact that the judgments of the inferior court are *occasionally* reversed is no argument against the system of appeal. In such case, the inferior court generally does its work well. *Generally* its judgments stand. For the work marked out for it, it is in general better fitted than the superior court would be. But the precise character of a case, and the issues involved therein, are not at first sight obvious; and even though a case may, in certain of its aspects, and with respect to certain issues involved therein, be more suitable for the superior court, it may, with respect to other issues, be more suitably dealt with in the inferior court. In cases therefore involving distinct and independent issues, it would be unreasonable to expect that the litigation should always be carried on from beginning to end in a single court.

But for the satisfactory working of any system of appeal it is necessary—

(1.) That the issues submitted to the appellate tribunal should always be clear and distinct.

(2.) That the moral authority and weight of the appellate tribunal to decide the issue submitted to it should be unmis-
takably, and by common consent, greater than that of the tribunal from which the appeal is made.

The former of these objects will be secured, not so much by legislation, as by a proper preparation of the case in the court below, so that the issues may be clearly evolved, and the grounds of the judgment clearly stated, so that the Appellate Court may know exactly what it is that it has to decide.

The latter object is, unhappily, not always attended to: it is forgotten that litigation is of itself an evil; and any provision of law that tends to protract litigation should be carefully watched, and the necessity of it clearly demonstrated.

Let us consider this matter with respect (1) to matter of law; (2) to matter of fact.

(1.) On matters of law. These are the especial province of a Court of Appeal; the issues on which the right of appeal should be least restricted. Even on these points, as we have stated, care should be taken that the appellate tribunal should have unquestionably greater weight than the court below: else the Court of Appeal will be worse than useless, as not only will it protract the litigation, but will lead suitors to think that the law is after all but a lottery, and that the decision of a case will depend not so much on the actual merits of the case, as on the constitution of the tribunal which is called upon to adjudicate in the last resort.

We cannot better illustrate our meaning than by reference to the Judicial Committee. Seeing that the members of that tribunal are for the most part ex-judges either in Common Law or Chancery in England and Ireland; that they have to adjudicate in the last resort in cases arising out of the different systems of law which prevail in the different parts of the British Empire; and seeing that the committee need not, on any one occasion, consist of more than three members, the wonder is that we have as few complaints as we do of the Privy Council judgments. We fear, however, that this is not to be imputed to the intrinsic soundness of those judgments on points of the law, but rather that the parties concerned live for the most part in other quarters of the globe. When the Privy Council does deal with home ques-

tions, we hear occasionally a good deal of discontent. We may illustrate this by the frequency with which important ecclesiastical judgments of the Privy Council are challenged extensively by parties within the Established Church. The last ecclesiastical judgment of the Privy Council has found a formidable opponent in Sir J. T. Coleridge. Now, a court of final appeal ought not only to be just but to command public confidence in its justice; and it would be ridiculous to assert that these judgments of the Privy Council are received with general confidence. They are, as a rule, approved by the religious parties which they may happen to favour, and protested against by the rest. And it cannot be said that the reasoning by which they are supported is so clear and satisfactory as to convince any unprejudiced mind of its accuracy. As it is, the judgment seems to depend on the accident which may determine the constitution of the Court on any particular occasion.

(2.) On matters of fact. As a rule, the inferior court will be a better tribunal for the determination of matters of fact than the superior court. We are here speaking of pure matters of fact, and not of legal principles as applied to determining questions of fact. In the case we suppose, it is not objected that there was any irregularity in the judgment of the court below, but merely that the verdict, or judgment, on matter of fact, was contrary to the evidence. We are not now speaking of the case in which a reversal of the judgment is sought in consequence of the discovery of new evidence, or other extrinsic cause. Any application for such a purpose may be made equally well to the court below. (We do not, in saying this, mean to refer to any law or practice actually in existence, but to the theory of the question.) See *Lyall v. Jardine*, 18 W.R. 1050. What we are now considering is the case where it is sought to impugn the judgment of the court below in a matter of fact on the evidence adduced before it. And the Court of Final Appeal have, most reasonably and naturally, shown

themselves very reluctant to interfere with the decisions of the courts below on such questions.

In *Rogers v. Attorney-General*, 19 L.T., N.S., 217, the House of Lords held itself incompetent to review a decree in which the only matter, by way of recital, was the verdict of a jury, and which was correct in point of form, and otherwise unobjectionable.

In *Reid v. Aberdeen, Newcastle, and Hull Steamship Company*, L.R., 2 P.C., 245, the Privy Council held that it would not reverse a decision of fact in a court below, which had had the advantage of seeing the witnesses, unless it were overpoweringly clear that the decision was wrong.

In *Gray v. Turnbull*, L.R., 2 Sc. App., 53, it was held that an appellate tribunal ought not to be called up to decide which side preponderates in a mere balance of evidence; and that, to procure a reversal, it must be shown that the judgment complained of on a matter of fact is not only wrong, but entirely erroneous.

We would here say a few words with regard to intermediate Courts of Appeal. Nothing can be more mischievous than to allow a suitor to go to a Court of Intermediate Appeal, and thence to proceed to a Court of Final Appeal, thus wantonly protracting the litigation, and involving expense.

Any appellant proceeding from a Court of First Instance, to a Court of (so-called) Intermediate Appeal, should be estopped by his own act, and not be allowed to proceed further. So a respondent submitting to a Court of (so-called) Intermediate Appeal, should be estopped by the submission. But it ought to be open and competent to the party defeated in the Court of First Instance, if he think fit to go at once to the Court of Final Appeal, or for the party successful in the Court of First Instance, on receiving notice of appeal to the intermediate tribunal, to compel his adversary to go at once to the Court of Final Appeal. In other words, we would have parties make up their minds beforehand whether they intend to accept the decision of the intermediate tribunal as

binding or not, and to be bound accordingly. This would of course convert the Intermediate Court of Appeal into an Alternative Court of Final Appeal.

With regard to appeals in criminal cases, they should be governed by precisely the same rules as appeals in civil cases. It might be urged that persons condemned to severe punishment would always appeal; but for any abuse of the right of appeal the barrister or solicitor who signed the appeal might be held responsible, assuming, of course, that the alleged ground of appeal was palpably frivolous and absurd.

We have thus gone through a few of the principal questions connected with the subject of appellate jurisdiction. It has been our object rather to discuss the theory than to enter minutely into the practice as it exists in England.

ART. XI.—METTRAY.

OUR readers will probably most of them be acquainted with at least the name of the reformatory *colonie* of Mettray. Those who have taken interest in the reformation of criminals have long been familiar with it. The great movement begun in England, now five-and-twenty years ago, owed much of its success to the example of Mettray, and the writings and labours of those who had established it. Its founder and *directeur* may claim much of the credit of having originated the reformatory school system. Sir Eardley Wilmot has pointed out that to Worcestershire belongs the glory of having seen the first institution of the kind in England, and that in priority of time this institution, founded by his father, takes precedence over that of Mettray. Others claim the honour of having established the first reformatory school as belonging of right to the city of Hamburg. But whatever may be the merits of

these claims, the credit belongs to M. Demetz of having established a successful working model for reformatory schools. In this sense Mettray may be regarded as the great exemplar of reformatory schools. Mettray has been the model for imitation in many countries. In France there are now eighty-two similar institutions. It has been singularly successful in the large per-centage of children whom it has been able to return to society. Before M. Demetz's labours the number of apprehended children who relapsed into crime was at the rate of 45 per cent. ; since the establishment of these *Colonies* the proportion, as certified by the Minister of Justice, is only 5 per cent. M. Demetz has been able to keep up a communication with most of his pupils after leaving Mettray. When they are out of work they have been able to return to the *Colonie* ; when sick they have been able to gain admittance to its infirmary. As the youths have gone from one part of France to another they have been kept in friendly communication with benevolent persons, ready to assist M. Demetz in his work. They go out into the world as agricultural labourers, as mechanics, as sailors, soldiers, butchers, bakers, tailors, and shoemakers. Everywhere the success of Mettray has been acknowledged.

Our object, however, in now calling attention to the *colonie* is not to enter into any discussion of the question whether Mettray was or was not the first reformatory established. It is rather to call attention to the fact that M. Demetz, its brave founder, its clear-headed, patient, noble old director, is now in England, and under sad circumstances. Mettray is situated about five miles from Tours. As might be expected, it has been used by the Prussian soldiers during their occupation. Worse fate still, it has been in the occupation of the French troops. The discipline of the former caused the enemy's troops to do less harm to the institution than was done by the latter. But though the Prussians, recognising that the peculiar character of the institution afforded a claim even upon an enemy, held its buildings and fields sacred, yet the resources of the

institution are altogether exhausted. Misfortunes gathered thickly around the venerable director. He has had to maintain during many consecutive weeks, first Prussian, and then French soldiers. He has seen the institution's stores gradually disappear. Its flocks and herds are gone. Its hay and corn are consumed. Not a farthing of subscription has been received since the war began, nor can M. Demetz hope that the usual departmental contributions will be forthcoming during the current year. All that remains is the seventy centimes paid by the Government for each *colon* per diem, and in the present financial condition of France even the continuance of this grant is very doubtful. In addition to these misfortunes, the expenses of the *colonie*, owing to the high price of food, have been already raised 50 per cent.

Without some aid the *colonie* must fall, and the lifelong work of M. Demetz be destroyed. If, however, funds for carrying it on during this year can be raised, he believes the institution will be saved.

We have simply stated the bare facts of the case because we are convinced that this is all which is needed to enlist the sympathies of our readers. M. Demetz in his old age has come over to England to see if he can raise a sufficient sum of money to save Mettray from total ruin. Nearly a thousand pounds has been raised already. Three thousand are required. The Jurisprudence Department of the Social Science Association have taken the matter in hand, and a subscription list has been opened, which we heartily hope will soon be filled. Any of our readers who wish for further information on the subject, or who are willing to help in this cause, may obtain their object on application to Edwin Pears, Esq., Law Amendment Society, 1, Adam Street, Adelphi, W.C.

DIGEST OF SCOTCH CASES ON QUESTIONS OF GENERAL APPLICATION.

25 May, 1869.—*Gregor v. Forster*.—41 *Jurist*, 425.

MARRIAGE—PROOF.

AN action of declarator of marriage between a landed proprietor and his housemaid, founded on mutual holograph writings on the fly-leaf of a Bible, in the following terms:—"I (A B) take thee (C D) to be my wedded wife from this day henceforth until death us do part, and thus do I plight thee my troth.—A B, C D." The marriage was declared valid. Per Lord Ardmillan.—"There can be no doubt that if this writing is authentic, its words are clear, distinct, and unqualified, and that if they mean what they express, they are sufficient to instruct that interchange of consent which constitutes marriage. I am not aware that I have ever seen a writing of the kind more unequivocal and conclusive in its terms. The first question is whether this writing is authentic. The defender denies its authenticity, and alleges in substance that the body of the writing, and the name alleged to be his, are not genuine but forged. I have carefully considered the proof, and I have arrived at the conclusion that the authenticity of the writing, and of the defender's subscription, is instructed by the evidence. I leave altogether out of view the testimony of engravers who were not previously acquainted with the writing of the defender, and spoke only to their opinion on comparison of handwriting. It has been for some years past the opinion and practice of the Court that evidence by comparison of writing given by persons not acquainted with the handwriting of the party is most unsatisfactory. I do not say that it is in all cases absolutely incompetent, but I am clearly of opinion that it cannot be relied on. If comparison of writing is to be considered as an element of proof, which I do not dispute, then it must either be comparison by those who knew the handwriting of the party, or comparison by the Court according to the best of their judgment on personal examination. The testimony of engravers, or men of skill suggesting minute points for comparison or for distinction, is, in my opinion, not only an unsatisfactory but a dangerous species of evidence. Accordingly I leave it out of view."

28 May, 1869.—*The Anderston Foundry Company v. Law and Others*.—41 *Jurist*, 449.

SHIP—LIABILITY.

A SHIP bound for Bombay, *vid* Melbourne, put into Rio in a disabled state. The Master borrowed money on bond of bottomry and re-

spondentia on the ship, freight, and cargo. At Melbourne the bondholders got decree and sold the ship, and the proceeds not being sufficient, applied a portion of the cargo. *Held* (1st), that the voyage having been brought to an end at Melbourne, the owners were not bound to carry the cargo to Bombay. But (2ndly) they were bound to indemnify the owners of the cargo for the part included in the bond; and (3rdly) they were not entitled to an assignation from the owners of the cargo to the insurance policies on payment of the sums recovered. Per Lord President (Ingليس).—"In repairing the ship the master was acting as the agent of the owners, and in providing money to pay for these repairs, it must follow that he was representing the owners alone. His power over the cargo enabled him to hypothec it for repayment of the money advanced for repairs. But he was then only borrowing for the benefit of his owners, the use of his credit arising from his possession of the property of the shippers. And if their property is lost in consequence, they plainly have an action against the shipowners on the ground of 'recompense,' that implied equitable contract which runs through and characterises the whole maritime law of Europe." Reference was made to the English cases, *Benson v. Duncan* (18 L.J. Exch., 169); *Spence v. Chadwick* (16 L.J., Q.B., 313).

3 June, 1869.—*McCormack & Co. v. Rittmeyer & Co.*—41 *Jurist*, 465.

SALE—REJECTION.

IN an action of damages for breach of contract in respect of disconformity of goods to order, the goods were retained on special bargain. Decree given on proof of that bargain. Per Lord President (Ingليس).—"The decision being rested on the special bargain has the effect of saving the rule of law. This is so far satisfactory, but to prevent misunderstanding, I think it right to state the rule of law as I understand it. When a purchaser receives delivery of goods as in fulfilment of a contract of sale, and thereafter finds the goods are not conformable to order, his only remedy is to reject the goods and rescind the contract. If he has paid the price, his claim is for repayment, tendering redelivery of the goods. If he has granted bill for the price, his claim is for redelivery of the bill in return for the offered redelivery of the goods. If any portion of the goods has before their rejection been consumed or wrought up so as to be incapable of redelivery *in forma specifica*, then the true value (not the contract price) of that portion of the goods must form a deduction from the purchaser's claim for repayment of the price. The purchaser is not entitled to retain the goods, and demand an abatement from the contract price corresponding to the disconformity of the goods to order, for that would be to substitute a new and different contract for the contract of sale which was originally made by the parties, or it would resolve into a claim of the nature of the *actio quanti minoris*, which our law entirely rejects. Just as little is the

purchaser entitled while rescinding the contract to retain the goods in security of a claim of damages for breach of contract."

5 June, 1869.—*Smith v. Smith*—41 *Jurist*, 465.

HUSBAND AND WIFE—LIFE INSURANCE.

A HUSBAND insured the life of his wife, the sum to be paid three months after her death to her heirs, executors, and assignees. The wife predeceased the husband who paid the premium. *Held*, that the sum did not form part of the goods in communion, but fell entirely to the wife's executor, being her children. Per Lord Justice Clerk (Moncrieff)—"The proceeds of this policy was no part of the goods in communion, because the policy did not become a debt due by the insurance company till the marriage was dissolved."

10 June, 1869.—*Richardson v. Knox*—41 *Jurist*, 470.

ANNUITY—RESIDUE.

Held, that the claim of an annuitant is preferable to that of a residuary legatee, and where the revenue was not sufficient to meet the annuity, trustees were bound to apply the capital to purchase an annuity, or to supplement out of the capital the deficiency to meet the annuity. Per Lord President (Inglis)—"An annuity is a special legacy payable annually in place of all at once, and there can be no doubt that the rule of law is that no special legacy is to suffer abatement, as in a question with the residuary legatee, who only takes what is left after the payment of special legacies."

15 June, 1869.—*Rev. Robert Thomson v. Buchan*—41 *Jurist*, 505.

MEMBER OF PARLIAMENT—ELECTION EXPENSES.

THE town clerk of a parliamentary borough sued a candidate for his share of the expenses of the polling places and his fee. Defence under the Corrupt Practices Act, 26 Vict. c. 29, no payment can be made except through a known agent *repelled*, and defender held liable (Lord Deas dissenting). Per Lord President (Inglis)—"I am of opinion that no one can make a payment of the nature of election expenses directly to the creditor without subjecting himself to the penalties, but that by no means exempts a candidate from making payment or being sued for payment of the expenses incurred by him. The Statute only provides the hands by which the payments shall be made. If any other construction were put upon this section the result would be absurd, for a candidate might refuse to advance money to his agent for the purposes of his election, and when sued for payment of some just claim defend himself on this clause." His lordship indicated an opinion against the legality of the borough

clerk to charge a fee. Per Lord Deas—"I cannot understand how when the Statute expressly says that the candidate shall not pay except through his agent, it can be competent to conclude against him to do the very thing which the Statute forbids him to do under the penalty of criminal consequences."

23 June, 1869.—*City of Edinburgh Brewery Company v. Durham*, 41 *Jurist*, 507.

JOINT STOCK COMPANY—MISREPRESENTATION.

A PERSON took shares on the faith of a prospectus mentioning the capital "with power to increase." In the registered Memorandum of Association power was reserved to increase, *reduce*, or alter the capital. The Company prosecuted for allotment money and calls. *Held* (1stly) The change was not so material as to entitle the party to repudiate. (2ndly.) That exaggerated statements in a prospectus not fraudulent did not free from liability. Per Lord President (Ingليس).—"I entertain no doubt that if the business of a company should be described in the prospectus as being of one distinctive character, and the business as ultimately fixed by the Memorandum be of a clearly different character, the person who has been induced on the faith of prospectuses to take shares will, as soon as he discovers the variance, be entitled to have his name removed from the register, because the company of which he undertook to be a partner is not the company of which he has been made a partner by the inserting of his name in the register. And the same would hold if the extent of the business undertaken by the company as incorporated were greatly in excess of what was proposed by the prospectus, though of the same kind. But, in the absence of fraud, it may be greatly doubted whether the applicant for shares is not bound to make himself acquainted with the terms of the Memorandum of Association as soon as it is registered, and whether, if he allows his name to be put on the register, after this he is not bound by the terms of the Memorandum."—English cases cited chiefly, *Green v. General Provident Assurance Company*, 29 May, 1868; 18 *Law Times*, 500.

25 June, 1869.—*Hunter v. The Lord Advocate and others*.—41 *Jurist*, 513.

PROPERTY—FORESHORE.

A CONTRACT of feu conveyed a portion of an estate on the bank of a river, describing the land as bounded by the sea. *Held* that the whole right was conveyed, and the superior could not claim alluvial ground gained between the feu and the sea (Lord Deas dissenting). Per Lord President (Ingليس).—"I am prepared to hold that when a proprietor holding of the Crown feus land, and not giving his feuars a different boundary from that which he himself has, he must be held to have given out to them all the estate and

interest in the foreshore which he himself had, whatever that may be. Per Lord Deas—"A superior who grants a feu right is never understood to give away anything more than the grant bears. The radical title remains in him. I do not see any principle to entitle a man in all cases, because a certain subject is mentioned as his boundary, to have that subject to remain for ever, as it was, in the time when it was originally described as his boundary."

25 June, 1869.—*Metzenburg v. The Highland Railway Company*.—41 *Jurist*, 522.

PUBLIC CARRIER.

Held, that a railway company receiving goods to be conveyed to a place beyond their line is liable for their safe conveyance to the journey's end; if the consignee refuses to take delivery the last company must store the goods, and give the consignee the opportunity of disposing of them, and, if delivery to the consignor is refused, the first company is liable.

29 June, 1869.—*McLaren & Co. v. Carter*.—41 *Jurist*, 528.

BANKRUPTCY.

Two separate companies, but with the same partners, were put under sequestration at the same time. An offer of composition was made to the creditors of both firms, on the provision that the creditors on both firms should rank on both for their full claims. *Held* that the offer was not competent and refused. Per Lord President (Inglis)—"The two businesses were separate and distinct. The creditors were not the same, though it is said, but not admitted, that there were some of them who may be entitled to rank on both estates, and that it was to avoid the complication arising from there being two estates, and the prospect of some double rankings, that the device was fallen on. But it seems to me an arrangement between the two bodies of creditors to mass together the two estates and deal with them as one estate. That might be highly expedient, but the only question we have to do with is, whether the proceeding was within the contemplation of the Bankruptcy Act, and there can be no doubt that it is not. With the motive of this arrangement, whether good or bad, we have nothing to do, but its incompetency and absurdity are, I think, very manifest. It is a radical violation of the Statute.

5 July, 1869.—*Graham v. Hamilton*.—41 *Jurist*, 547.

PROPERTY—MINERALS.

A FUED B, reserving the minerals within the lands, with free ish and entry for taking them away on payment of any damage done

thereby. The minerals under B were nearly exhausted, but the minerals under other adjacent lands, belonging to A, were wrought. *Held* that the feuar of B had right to obtain interdict (injunction) to prevent the use of the underground waste for any purpose other than to convey minerals wrought under B, and not from adjacent lands. Per Lord Benholme—"To my mind, there can be no reason to doubt that when the coal and lime stone are all worked out, the space formerly occupied by these minerals belongs to the feuar. If there be water in it it is his; if it be waste without water it is still his. It may be said there cannot well be property in mere space, but I say there may be property in that space if a use can be made of it. The tendency of my opinion is that the superior loses the property in the space as the estate to which he had a right is extinguished. He is not entitled to use the space for a privilege altogether foreign to the right which he has reserved."

Frances Kennedy v. Murray, 41 *Jurist*, 560.

SALMON FISHERY.

THE Salmon Fishery Commissioners by statutory by-laws enjoined certain rules to be observed by the owners and occupiers of mill lades and dam dykes. *Held* by four to three judges that the Commissioners had power to compel the owners or occupiers of the mills to execute the operations at their own cost. In a subsequent case—20 July, 1869, *Blair v. Sandeman*, 41 *Jurist*, 643—it was held that the obligation could not be enforced under the Summary Procedure Act for penalties.

8 July, 1869.—*Moore v. Gledden*.—41 *Jurist*, 567.

PLEDGE—POSSESSION.

A CONTRACT between a railway company and a contractor had a clause that all plant brought to the ground were to be held the property of the company. *Held* by the majority of seven judges (Lord Kinloch, dissenting) that the company had, under the clause of deposit, a real right of pledge preferable to the contractor's other creditors.

10 July, 1869.—*Beveridge & Co. v. Beveridge*—41 *Jurist*, 575.

PARTNERSHIP.

Held (1st.) That trustees and as such partners in a trading firm could not give authority, even to one of their number, to sign the company's firm. (2nd.) That a person appointed manager could not leave blank cheques in the hands of a confidential clerk. (3rd.) Or lend or deposit spare capital to banks trading with the colonies. But (4th.)

he had the power to regulate salaries and alter machinery, unless where proved to be to the prejudice of the company.

10 July, 1869.—*Brotchie v. Stewart*.—41 *Jurist*, 583.

TRUST.

Held that a trustee was entitled to complete the erection of a mansion-house commenced by the truster.

Caledonian Railway Company v. Union Railway Company.—41 *Jurist*, 605.

RAILWAY—LANDS CLAUSES.

Held that the s. 120 of the Lands Clauses Act, as to superfluous land, applies only to land acquired under compulsory powers, and not by voluntary agreement.

Nicholson v. Nicholson.—41 *Jurist*, 613.

PARENT AND CHILD—CUSTODY.

Held, a mother was not entitled to deprive the father of the custody of an infant seven months. Per Lord Deas—"The law confers a full and large discretion on this Court in cases of this kind. I think we have under the Common Law the same discretion, as it seems they now have in England by Act of Parliament, but it is a discretion to be exercised with great caution." Per Lord Ardmillan—"The legal right to the custody of a lawful child is in the father, and a court of law will enforce that right by the appropriate compulsories, but the right is not absolute. It is not beyond the control of the law, it is within the power and the duty of a court of justice, and more particularly of this Court, which is a Court both of Law and Equity, to mitigate in the exercise of a cautious discretion the severity of the general rule, by interposing in exceptional cases. The exceptions must be few, and must rest on clear grounds, and these grounds must be found in considerations of danger to the life, health, or morals of the child." "The recent Statute in England tends to afford mothers in that country some additional protection, but the division of the English Courts into Courts of Law and Equity seems to have created difficulty, and to have made legislation necessary."

20 July, 1869.—*Mean v. Mean and Others*.—41 *Jurist*, 617.

PARENT AND CHILD.

A LADY living out of Scotland, allowed on her coming to lodge in Scotland to have her pupil children with her for three days in each fortnight during school vacation, and thereafter to visit them at

school once in each fortnight, though her deceased husband had directed their children to be entirely removed from her control and influence.

20 July, 1869.—*Sir James Maclueren v. McKenzie.*—41 *Jurist*, 626.

DEPOSIT RECEIPT—LEGACY.

A DEPOSIT receipt by a bank bore that money was received “from two named parties, and was payable to either as survivor.” *Held*, that the money was not the property of the survivor either as a legacy or donation, the receipt not being delivered to her. Per Lord Justice Clerk (Moncrieff)—“Deposit receipts are mercantile documents not very different in their nature from promissory notes. It is an attempted conversion of a document of commerce to purposes of testamentary succession which has been found unavailing in cases of bills. The custodier could have disposed of the money without any trammel down to the day of her death. It is a pure question of succession, and so falling under the law, not of *jus quæsitum* but of succession.”

H. B.

Notices of New Books.

[** It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

The Practice of the Court of Probate in Common Form Business.

By Henry Charles Coote, Esq., F.S.A., Proctor at Doctors' Commons; author of the Practice of the Ecclesiastical Courts, &c., &c.

Also, a Treatise on the Practice of the Court in Contentious Business. By Thomas H. Tristram, D.C.L., Advocate in Doctors' Commons and the Inner Temple. Sixth Edition. London: Butterworths, 7, Fleet Street. Dublin: Hodges, Foster & Co. Calcutta: Thacker, Spink, & Co. Bombay: Thacker, Kising, & Co. Melbourne: George Robertson. 1870.

IN 1858 Mr. Coote published a first attempt to explain the principles which were to regulate the Common Form Practice of the then new Court of Probate. Up to that time those principles had been carefully concealed from the outside public, and particularly from the legal profession. But with the creation of the new jurisdiction the monopoly of the proctors was at an end, and their special practice was thrown open to the profession. From Mr. Coote's manual the attorney first obtained the information which enabled him to prove his clients' wills, to take out limited administrations, or even grants "*cæterorum*." He it was who first explained to practitioners in Bedford Row and Lincoln's-Inn the meaning of the mysterious "*caveat*" and the *rationale* of the grant of an administration "*De bonis non*." Very welcome indeed, therefore, was his opportune book, of practice, and its utility has been significantly proved by the fact that we have the sixth edition now before us, bound up together with Dr. Tristram's "Treatise on the Practice of the Court of Probate in Contentious Business."

The necessity for a complete work on the Procedure of the Court of Probate is obvious. It deals with a class of litigation second to none in importance. Fortunately that procedure has been framed in such a manner as to render it very difficult for the most ingenious subtlety to make it complicated; and the vigorous common sense of two of our best judges has given Dr. Tristram a body of lucid and sound decisions on the new practice. He has applied them with judgment

and care, though in some respects his treatise appears to us to be rather meagre. This, however, is due in some measure to the fact that the proceedings in the Court of Probate are essentially simple, and that they deal only with one particular class of rights. On the whole, we think that those whose good fortune it is to get work at the further end of Westminster Hall are to be congratulated upon having only to master Coote and Tristram instead of Chitty's Archbold.

The Medical Practitioner's Legal Guide ; or, the Laws Relating to the Medical Profession. By Hugh Weightman, M.D., Cantab., Barrister-at-Law of the Inner Temple. London : Henry Renshaw, 356, Strand. 1870.

MANY years have elapsed since any work has appeared on questions of law relating to the medical profession. The treatise of Mr. Willcock's was once in vogue, but the lapse of forty years has rendered it obsolete, and modern legislation on medical affairs brings into request, and amply justifies, the preparation of a new work. The work indeed forms a very useful and ready means of reference to all those Acts of Parliament by which a medical practitioner may wish to seek guidance in the discharge of his public and private practice. The Medical Witness, Lunacy, Vaccination, Pharmacy, Contagious Diseases, and the Medical Acts, are all printed with their amendments, *in extenso*, including about twenty Acts or amended Acts. Some of the early chapters treat upon defamation of character, on the law of copyright, more particularly, we presume, as it applies to the writings of medical men, who, by-the-bye, seem more than most persons addicted to book making ; the law of partnership, in which, too, they frequently, we regret to say, have to suffer, is considered of sufficient importance to occupy a distinct section of the work. There are unquestionably, looking at the work in the medical point of view, some obvious defects and shortcomings, which must of necessity be so where the author makes no pretension to experience in medical science or practice.

Any one familiar with the daily routine of medical practice will be disappointed to find, if he wish for information, that the author does not deem it desirable in the treatise to bring under notice "such Acts as relate to the establishment of baths and wash-houses, however beneficial they may be in a sanitary point of view, nor yet those which relate to the supply of water, and the sewerage, drainage, cleansing, and paving of towns and populous places, however these may promote the health and comfort of their inhabitants, nor yet those Acts to prevent the spreading of the contagious and infectious diseases amongst cattle or other animals, or to prevent the adulteration of articles of food or drink, however such may check the supply of unwholesome food. Neither will such Acts as have been passed to abate nuisances arising from the smoke of furnaces and steam vessels, be deemed

within the province of this work, and even such exhalations as may be sometimes noxious as well as offensive, the object being, as expressed by the author, to devote the few pages allotted to this subject, that of contagious and infectious maladies, to the consideration of those laws whose tendency is directly to prevent diseases, and not merely indirectly to promote the greater salubrity of the population."

All this it is right to mention, for it is just such kind of knowledge of the laws relating distinctly and most usefully to the medical profession in its actual practice, that might easily have been included with other branches of legal knowledge here introduced, and would have occupied less space than that which is now devoted to matters of very little interest to any one; such, for instance, as the ancient orders of the medical profession, with historical notices of Hippocrates, the works of Galen, medicine in the dark ages, or the short history of the College of Physicians, or the chapter relating to the modern orders of the medical profession. All this even, if it be intended to prompt counsel in a case, or to inform a judge or jury, is as little to the purpose, and as imperfectly done, as if a medical man were to descant upon the rank, status, and functions of gentlemen in the various grades of legal practice.

There is, however, a good deal of useful material in a small focus, and, as fresh legislation is proceeding, new matter will soon have to be added to make a complete work, when we may hope the editor will include an epitome of sanitary law, alongside that of the other laws now before us, the former being, in our judgment, too seldom referred to in the present day, either by members of the legal or of the medical profession, for whose special benefit of the latter of which we presume this work was intended, judging from its publication having been confided to a well-known medical publisher.

The Law of Negligence; being the first of a series of Practical Law Tracts. By Robert Campbell, M.A., Advocate (Scotch Bar), and of Lincoln's-Inn, Barrister-at-Law, late Fellow of Trinity Hall, Cambridge. London: Stevens & Haynes. 1871.

WE have read this work with much interest, and have much pleasure in the prospect of receiving other works from the author written according to the same design. Although Mr. Campbell deals exclusively with principles and cases which illustrate them, his book may be fairly considered as practical. It is an attempt—and we think, on the whole, a successful attempt—to classify the different cases relating to negligence, and to explain the grounds on which they were decided with reference to principles common to the English, Scotch, and Roman laws. The practical application of those principles to any case which may arise is thus greatly facilitated, and the present work may therefore be of much service to practitioners, although not likely to supersede the excellent treatise of Mr. Saunders.

To students, however, Mr. Campbell's work will be peculiarly

valuable, not merely from the light which it throws on the Law of Negligence, but from the tendency which it will have to cultivate the faculty of analysis, which it is of the utmost importance should be exercised by those who wish thoroughly to understand the law of England. No knowledge of principles, indeed, can obviate the necessity of familiarity with the vast mass of details which our law—and especially the Common Law—presents, but the real significance of these details will be much better understood, and an additional interest communicated to their study by an acquaintance with the scientific basis on which they rest. Even those who have much familiarity with the subject here treated of may peruse Mr. Campbell's work both with profit and pleasure, and we are very sure that few who open it will be inclined to stop until they have arrived at the last page. It is well arranged, carefully prepared, and, notwithstanding a few expressions which to some may seem to savour of affectation, clearly and neatly written.

Mr. Campbell, after considering the principles which apply to the subject, and explaining the terms which have been used in connection with it, discusses, without drawing a line between obligations arising from contract and those arising from tort, the different degrees of negligence for which liability attaches in the various circumstances and transactions where a duty is imposed. These he treats under the heads of *Exacta diligentia* or *Culpa levissima*, *Culpa* (simply) and *Culpa lata*. All the cases are ranged under these heads in a logical and perspicuous manner. The divisions cover the whole ground; and the cases fall into their proper places without any difficulty or straining. The present publication only professes to be the first of a series of Practical Law Tracts, and of course makes no pretension to be a regular treatise. If the author had undertaken to treat the whole subject fully, we should have said that on some points he ought to have given a more ample statement of legal doctrine and its application. The question of contributory negligence, for example, is one of great importance in practice, and of some difficulty in theory. What Mr. Campbell has said on this subject is, no doubt, very just and very sound, but in a work of higher pretensions than his, a fuller exposition would certainly have been necessary. But however important in a practical point of view the question of contributory negligence may be, and however small the space it occupies in the present work, we cannot say that Mr. Campbell has neglected the true rules of intellectual perspective in his treatment of the Law of Negligence. He lays down principles, and illustrates them in a manner which shows that he is thoroughly acquainted with the subject on which he discourses, and has surveyed it in all its bearings. We can safely recommend the work to our readers, and promise them, if we are to judge from the impression it has produced on ourselves, much gratification in its perusal.

Considerations on Law. London: Amer. 1871.

We do not at present feel ourselves to be in a position to pronounce

any opinion on this abstruse treatise. The author brings forward in a very abstract style his views on the nature of law, the authority of law, and the form of law. We must frankly confess that having read the whole work, we feel somewhat at a loss to discover precisely what is the Q.E.D. We have no doubt as to the ability of the author, but the exact value of his views we must take time to consider. We give the following extracts for the benefit of our readers.

"Right is no otherwise the creature of law than as it is an instance of a rule which is accompanied and enforced by power. Law is the sum total of the rights and duties contained in or expressed by it. Right is a form of power—power against another according to a rule; duty is a form of subjection, subjection to the power of another according to a rule; law is the statement of those forms of power and subjection."—P. 3.

"The whole value of speculations on law in general consists in their practical application. The application lies in the organisation of law; in determining what are its parts, and what is their relation to one another. What these are must be ascertained by the consideration of the actual facts of law, from which we discover its necessary elements, and the combination of those elements. The aim of speculation therefore ought to be, not to create and give vogue to an abstract theory, but to discover what law, rights, and duties are, as they exist and have existed, and how they operate upon the relations of fact in which, independently of law, men stand to one another. Every speculation of this kind must prove itself; for it must be attested by its efficiency. If the rules of law can be drawn out and arranged on its basis, it is sound; if not, it is unsound. Perhaps, therefore, no such speculations should be laid before the world except accompanied by this proof; but to exhibit the proof in such a shape as to be fit for publication is more difficult, and is a more delicate and a longer task than to have satisfied oneself that the proof can be made. Meanwhile the speculation must go for whatever those who are competent judges of such matters think it to be worth."—P. 45.

A Practical Guide to the Law of Tenant Compensation and Farm Purchase under the Irish Land Act, 1870. By Robert Donnell, M.A. (Queen's Univ., Ireland), Barrister-at-Law, &c. Dublin: John Falconer. 1871.

THE well-printed and well-arranged work before us is the fourth or fifth treatise on the Irish Land Act which has appeared since August last, when that important measure received the Royal assent. Nor can it be said that too much attention has been bestowed by legal writers on an enactment which directly affects, and in some important particulars changes, the relations of landlord and tenant throughout Ireland. Mr. Donnell's edition of the Act evinces minute care, and a diligent observation of all that former editors have done and written. He has the double advantage of profiting by the labours of

his predecessors in the same field of inquiry, and of including in his book some decisions which very lately have been pronounced by the county chairmen, and by the judges of Assize. The annotations are concisely and carefully prepared; but we are of opinion that in such cases annotations should be grouped (in a different type) immediately under the sections to which they relate. The extraordinary popularity of "Morgan's Chancery Acts and Orders" with the profession may be in great degree attributed to that arrangement; and "Morgan" may be regarded as the established and approved model for all editors of, and annotators upon, practical Statutes.

It was objected to the Irish Land Act, during its tedious course through the Legislature, that the interpretation of it was to be committed to some thirty-two different persons, being the county chairmen of Ireland. That these gentlemen shall take the same view of the questions arising on the Act is not to be expected. Their decisions will, therefore, hardly be valuable until they have been sifted and reviewed by the appellate court. Possibly in a twelve-month hence there may have been decisions on the doubtful points, which Mr. Donnell, or some other equally able editor, may include in a new edition. By that time the treatise before us (which we should add is excellently arranged and indexed) will probably have attained to the position of a law-book of recognised utility and assured standing.

Finally, it is to be regretted that the cumbrous mode of procedure under Part II. of the Land Act is such as in effect to discourage, if not to prohibit, purchases of their farms by occupying tenants. The intentions of the Legislature have in this respect been checkmated effectually by the authorities to whom the publication of "Rules and Directions" was committed. There is no prospect of a landlord and tenant completing the sale of a farm, when the proceeding will be attended with expense and delay equal to those of an ordinary Chancery suit. The second part of the Act contemplated an expeditious and inexpensive procedure; and we shall be surprised if the result is not, to render what might have proved a most useful division of the Act, little more than a dead letter.

The Constitutional History of the Church Briefly Examined. By the Rev. Charles Crosslé. London: Longmans, Green, &c. 1871.

THE present work is obviously not written for lawyers. It deals with Church History entirely in a partizan spirit, and will only be much valued by those who have a decidedly ecclesiastical bias. To others it may be interesting as a record of such views, *valeant quantum*.

Statute Index. By H. Walter Ibbotson, Solicitor. Third Edition. London: Longmans & Co. 1871.

THIS is a work likely to be of much practical utility. It is not so full as Stamp's Index, but is, perhaps, more convenient for ordinary

use. The book has been revised, and the references brought down to the end of last Session. A schedule is added containing a list of the Acts repealed by the Statutes for the revision of the Statute Law. The portable character of Mr. Ibbotson's book will also tend to recommend it both to the profession and the public.

Further Proposals for the entire Reconstruction of the whole Law.

By an Outsider. London: Ridgway. 1871.

THE author of this pamphlet objects to a digest and a code, but proposes that a Commission of "Privy Councillors and others" should collect the Statutes and cases into bundles and expurgate them. The residue of each should be separately arranged, and, as far as possible, according to the same distribution. An Act should then be passed enacting that the new collection of Statutes should be the Statute Law of England, and another Act (why have another Act?) enacting that the new collection of cases should be observed as the Common Law in all Courts. After this a digest should be framed containing a summary of the Law as it was to be found in the Statutes and judicial decisions, as consolidated and arranged according to the plan proposed. The pamphlet is certainly worth reading, but we cannot say that it settles the important question which is therein discussed.

Transactions of the National Association for the Promotion of Social Science, Newcastle-upon-Tyne Meeting, 1870. Edited by Edwin Pears, LL.B., General Secretary of the Association. London: Longmans & Co. 1871.

THE *Transactions* of the Association are a record of the papers read and discussions taken upon them at the Annual Congress of the four departments under which the work of the Association is recorded. We have here only to deal with one, that of Jurisprudence and Amendment of the Law. The President of this was Lord Neaves, a Scotch judge, who keeps up the best tradition of Scotch wit and wisdom, and whose songs will possibly be remembered when his decisions are forgotten. Perhaps the most interesting of the papers read at Newcastle are those which bear on the then pressing questions of International Law. "Is it desirable to prohibit the export of contraband of war?" was the special point under consideration. Mr. Westlake contributed such a paper on the subject as fully bears out the reputation he has gained as an international lawyer. He answered the question in the negative. For a summary of his arguments we must refer to the volume itself. The discussion which followed brought much valuable information. A paper on the subject of International Arbitration by Mr. Beggs opened up a still wider and more important question. The paper itself is an appeal to the common sense of the nation in favour of an earnest endeavour to

discover whether any system other than an appeal to war can be hit upon for the decision of international disputes. Mr. Beggs has no definite proposal of his own to make. The preface informs us that a special committee has been appointed to consider and report on the subject. Probably no one has any very sanguine hope that war may be at once got rid of. But the public discussion of the subject can only be productive of good. Once persuade people that war is an unnecessary evil, and the dawn of permanent peace will not be far off. All now agree that war is an evil. The men are probably extinct who glorified war as a means of keeping down the surplus population, or as producing an active and energetic frame of mind, while probably we should have to penetrate to remote districts to find the clergyman who still teaches that wars and their issues are divinely appointed methods of judgment. Even the *Record* lately found itself in a difficulty in accounting for the late war and its results. France had been defeated because she was Romanist and Infidel. *That* was clear. But how about Prussia? The *Record* was bound to admit that even a smaller per-centage of the people of Berlin went to church than that of the population of Paris. A generation ago and every religious publication in the country would have taught authoritatively what were the designs of Providence in the events which have lately taken place. Instead of this, we have now everywhere an outcry against the cruelty, the barbarism, the inherent injustice of war. Everybody acknowledges this, and all are ready to welcome any proposal which will enable us to do without war. The International League proposes one more war to put down all tyrants, and the establishment of a universal republic to accomplish this end. The *Commune* of Paris wishes for fraternity with all nations; in the midst of its own struggle for existence at once puts an end to the ill-treatment of German workmen, promotes Poles, Americans and Italians equally with Frenchmen, and talks of destroying the *Place Vendôme* because it gives offence to foreigners. Professor Seeley seeks to arouse the enthusiasm of humanity in favour of a proposal for the establishment of the United States of Europe, and believes that in this way, and in this only, may we hope to attain universal peace. Everywhere the common aspiration of mankind is increasingly in favour of peace. We are beginning to see that the United States of America, in fighting to preserve the Union, was fighting for an object as great and as noble as the extinction of slavery; that she was fighting to preserve that cohesion which enabled her when her greatness was over to at once disband her army of three-quarters of a million of men. With such an opinion rapidly becoming an instinct, it is clearly wise that students of social problems should turn their attention to the consideration of practical schemes, and for this reason we shall hail the appearance of the Social Science Association's report on this subject with great pleasure. Whether we agree with it or not will matter little. The great point is that the subject should be brought under public discussion, that popular attention should be repeatedly turned to it, and that thus public opinion should be educated. In taking discussions on such subjects,

and still more in carefully considering proposals brought before it, the Association is doing a national service.

Following the papers on international arbitration, comes one by Mr. Dudley Baxter on National Defences. The transition naturally recalls that of Cromwell's advice, "Trust in Providence, but keep your powder dry." The subject need not be gone into here. Mr. Wilson points out that the colonies afford good fields for experiments in government. We quite agree with him. In Natal, we believe, they have but one legislative house. The experiment would of course be more satisfactory if made in a colony like Victoria. Would it be impossible to have Mr. Hare's scheme of representation tried in one of our colonies? All our Australian colonies have tried many experiments in legislation, which we have either taken advantage of or are likely to do. The ballot has long worked admirably there. The hustings have long ceased to exist. Executions were conducted privately a dozen years ago. Several have already got far nearer the solution of the education difficulty than England has.

Mr. Joseph Brown, Q.C., took up the question of the unlimited liability of railway companies for the acts of their servants, and made out a very good case for the companies. Mr. Daniel, Q.C., writes on the subject of tribunals of commerce. Other papers of great interest follow, for an account of which we must refer our readers to the volume itself.

Judgment of the Judicial Committee of the Privy Council in the case of *Hibberd v. Purchas*. Edited by Edward Bullock, Esq., Barrister-at-Law, Reporter for the *Law Journal Reports* in the Judicial Committee. London: Butterworths. 1871.

Remarks on some parts of the Report of the Judicial Committee in the case of *Elphinstone v. Purchas*, and on the course to be pursued by the Clergy in regard to it. A letter to the Rev. Canon Liddon, M.A., D.C.L., from the Right Hon. Sir J. T. Coleridge. London: Murray. 1871.

Mr. BULLOCK's edition of the above important judgment is a useful publication. A concise statement of the charges against Mr. Purchas and of the results of the judgment is prefixed, and the Articles which were the subject of Appeal to the Judicial Committee are given in an Appendix.

Sir J. T. Coleridge attacks the judgment in what it lays down with respect to vestments, and the position of the officiating minister when consecrating the elements for the Communion. The author, however, has no sympathy with the High Churchmen who have ascribed all manner of improper motives to the members of the Judicial Committee who concurred in the judgment, and gives some very good advice to Canon Liddon, who had written an intemperate letter on the subject in the *Guardian* newspaper.

A Treatise on the Statutes of Elizabeth against Fraudulent Conveyances; the Bills of Sale Registration Acts, and the Law of Voluntary Dispositions of Property independently of those Statutes; with an Appendix, containing the above Acts and the Married Woman's Property Act, 1870; also some Unpublished Cases (1700 to 1733) from the Coxe and Melmoth MSS. Reports. By Henry W. May, B.A., Ch. Ch., Oxford, and of Lincoln's-Inn, Barrister-at-Law. London: Stevens & Haynes. 1871.

THE author has undertaken a work which will be found very useful, and we agree with him that it is strange that no modern treatise on the subject has before appeared to supply what has hitherto been an undoubted want. A large part of the law here collected together can indeed not be found in any other text-books, and as to the remainder, such notices as these are scattered in many books, and are very partial and insufficient—often necessarily so, because they are only parts of one complete subject with which the author deals. Judging from a first perusal, the practitioner will, we think, find nearly all the aid and information he may want, and the student will have a very readable means of gaining a comprehensive survey of the whole subject, and a knowledge of the reasons and principles of the law. It is not the author's fault, perhaps, that no reasons or principles have been deduced from the cases in some matters, as for instance in relation to what constitutes a complete gift in equity; for the courts have there done their best to confuse the subject,

The writer has evidently given to the cases (including the latest) an independent examination and analysis, and to those who know how many errors are often due to the evil practice of quoting second-hand, this will be a great merit. We have no doubt the volume will be looked into with great interest by the members of that branch of the profession to which it specially refers.

Patent Law and Practice; showing the Mode of Obtaining and Opposing Grants, Disclaimers, Confirmations, and Extensions of Patents. With a chapter on Patent Agents. By a Practitioner. London: Trübner & Co. 1871.

THIS work contains in a short space much useful information on the subjects mentioned in the title page. There are also added a schedule of stamp duties, a list of fees payable to the law officers, and a statement of the charges of practitioners in relation to patents. The book is intended for the information of inventors and patentees, to prevent them trusting ignorantly to those to whom they confide their patent business, and also for the use of such solicitors as may be suddenly called on, without having paid much attention to this subject, to give advice on some point connected with the law of

patents. For both objects the work is highly suitable. The author shows a thorough knowledge of the working of the patent law ; his information is accurate and clearly stated ; and no one, we venture to say, will be misled by him on a single point connected with the practice under the patent law. The work makes no pretension to be a complete treatise, but is well adapted for the ends it has in view.

A Practical Introduction to Conveyancing, containing the Substance of two Courses of Lectures delivered before the Incorporated Law Society in 1869-70-71. By Howard Warburton Elphinstone, of Lincoln's-Inn, Barrister-at-Law. London : W. Maxwell & Son, 29, Fleet Street. 1871.

THESE lectures are written in a pleasant style, and are as well calculated as any treatise on the subject could be to interest the reader. The lectures have some pertinent observations on the ignorance of the public in regard to English law, and ascribe it in a great measure to the influence exercised by the Roman law on modern thought. For ourselves we are inclined to regret that the notions of the Roman law are not more popular than they are, especially when we consider the enormous complications of the English law of real property, which, as Austin well observes, nothing but the eradication of the distinction between real and personal property will entirely remove.

The author also considers the position that "a man can do what he likes with his own." This position, in English legal writers, is generally involved in a good deal of obscurity owing to a confusion between rights over property and subjects of property, the word "property" being used indifferently to denote the one and the other. To say that the law will allow a man to use his legal rights as he pleases is merely to express a truism. To say that the law will not allow a man to use the subjects of his property as he pleases is to say that the law will not, to the extent covered by the proposition, allow an absolute interest in things which are the subjects of property. These fallacies are well treated by the author, who exposes them, not in the technical language which we have used, but by popular illustrations.

We must dissent from the author's statement, that the divisions between realty and personalty correspond "very nearly" with immovable and movable. Not that any reasonable fault can be found with such a statement, addressed to persons who are learning the elements of law. Everything cannot of course be explained at once. But the popular mind is very slow in understanding that "real property" (in the English law) has any other meaning than "immovable property," or "personal" other than "movable." This is often tacitly assumed when it is said that real and personal property are essentially distinct.

Mr. Elphinstone goes on to speak of the distinction between corporeal and incorporeal hereditaments as of great historical importance. Nothing can be said more truly. It is, however, the only importance which the distinction possesses; and the distinction has now been practically swept away by the Real Property Amendment Act of 1845.

We can only conclude by repeating what was said above, that nothing is more likely to give an intending student of the law of real property an intelligent interest in the subject than the perusal of Mr. Elphinstone's lectures.

Was Shakespeare a Lawyer? being a Selection of Passages from "Measure for Measure," and "All's Well that Ends Well."

By H. T. London: Longmans & Co. 1871.

WE see no reason why the learned author of this little book should have withheld his name from the public, when we consider that even a Lord Chancellor has been proud of the honour of associating his name with the works of Shakespeare on the same theme. Indeed, the noble peer, if we recollect rightly, treated the subject with much less research, and only dwelt on those passages in the plays which bore on the face of them unmistakable evidence of the possession of much legal knowledge in the writer. Unlike our author, Lord Campbell did not strain the language of passages almost to contortion to make them fit in with certain notions, the better to bear out the hypothesis that the author was a practical lawyer. There is no doubt that many obscure passages are apparently satisfactorily explained by the author, but other learned commentators have been content to accept them as they were, always avoiding the danger of putting a wrong construction upon them, or twisting them into really what was never intended.

Our author seems to be fully imbued with the idea that Shakespeare once practised the law. We have never heard it affirmed that he did, and the arguments, apart from the references to legal terms in the text of his works, rather point to the conclusion that he did not. It is pretty certain that Shakespeare was exceedingly familiar with a work of a contemporary author on wills,* and that much legal jargon is borrowed from this source, as shown by Mr. W. L. Rush-ton in his little book on the subject, published in 1869. The author has chosen for comment two plays only, and they abound with expressions of a semi-legal character. The plot and character of the *dramatis personæ* of the first of these favour highly the possession of legal lore; the other not much so, and therefore the expressions savour more of mere ordinary use.

The book will be read with interest by Shakespearians, and will form a useful addition to the already somewhat large accumulation of argument that Shakespeare was once a lawyer, although his possible period of practice is on all hands limited to seven years.

* Swinburne's "Brief Treatise of Testaments and Last Wills," 1590.

The Law and Practice of Bankruptcy and Imprisonment for Debt.
By Lawford Yate Lee, of Lincoln's-Inn, Esq., Barrister-at-Law.
William Maxwell & Son, 29, Fleet Street.

THIS book has come to our hands at too late a date to do anything like justice to its contents. It is founded on Shelford's "Treatise." It is a work of upwards of 1000 pages, and contains a copious index. Its list of reported cases alone occupies thirty-seven pages. It contains also the Statutes, general rules, and forms. The information which it contains is as complete as could be wished and is arranged methodically. It does not lay claim to be a scientific treatise on the law of bankruptcy, but is a book for actual practice. With this by his side no professional man, barrister or solicitor, need be at a loss to know either the state of the law or of procedure. The author informs us that having had the subject under consideration for some years he had determined to bring out a new edition of Shelford, but that the alteration of the law by the Act of 1869 was so complete, that he determined, and as it seems to us wisely, to write independently on this subject.

Village Communities in the East and West. Six Lectures delivered at Oxford by Henry Sumner Maine, Corpus Professor of Jurisprudence in the University, formerly Law Member of the Supreme Government of India. London: John Murray. 1871.

THOSE who are familiar with Mr. Maine's ANCIENT LAW will naturally expect to have in this volume one of great interest. Readers of the earlier work will remember that it was there clearly pointed out that civilisation had risen through status, understanding by that term all the rights and duties which are collected in the person of a particular individual, into contract; that when nations had been in the earlier stage of progress, they had in most instances been in the condition of groups of members having among them a community of property; that community in land, as it is the latest, was also the earliest, idea of property; and that private property, instead of having its rise, as was universally believed in the early part of this century, in the selection by individuals of the land each proposed to occupy, instead of each person becoming owner, as Blackstone says, "of that portion of land which he seized for occupation, for shelter, or for shade," is really the last step in the breaking up of a series of communal holdings, or the result of the intrusion of a new and advanced system of law into a society in which the purpose of law is only to fill the gaps left by the law set by each *paterfamilias*. In the same work also Mr. Maine pointed out that in India, in Russia, and in the border countries between Turkey and Russia there existed a system of village communities in which many of the ancient features of the institution had continued almost unchanged. In these countries there is still a community of land. No person is entitled to an estate

in fee in any portion of the land. Each person is part owner of the whole. A man may sell his rights, but the buyer must exactly step into his shoes, and must take upon him the exact rights and duties in regard to the co-owners that were gathered together in the person of the vendor. This state of things was still to be found in the Highlands of Scotland only 150 years ago. The Highland chief was not the feudal owner of the soil as our fathers regarded him. He was simply the executive officer, generally an hereditary executive officer of the clan. When modern law worked its way into the Highlands he was regarded as the actual owner, and no doubt great injustice was thus done to the clan generally by the aggrandisement of the chief.

In Scotland, too, as in Russia, the fiction which bound all the members of the community together was that of a common descent. Every one knew it was a fiction, but its efficacy was none the less powerful. Every one had seen new comers introduced and take upon themselves the common name. In Scotland and in Russia there seems to have been the periodical distribution of the produce of the soil and of provisions purchased for the common stock. But it was to India that Mr. Maine directed the attention of his readers as the country in which the village community was to be found existing in greatest perfection. When, therefore, that gentleman was appointed law member of the Supreme Government of India, every one expected that he would be able to add to the store of knowledge he had already gathered on this interesting subject. The volume before us is the first fruits of his Indian experience. It consists of six lectures delivered at Oxford, by Mr. Maine, as Corpus Professor of Jurisprudence. These are introductory to a "considerably longer course, of which the object is to point out the importance in judicial inquiries of increased attention to the phenomena of usage and legal thought which are observable in the East."

In obtaining the knowledge of Indian phenomena Mr. Maine acknowledges his obligation to Lord Lawrence and to Mr. George Campbell, now Lieutenant-Governor of Bengal. The interest of the book, however, is not exclusively in its descriptions of the Indian village community. It consists rather in showing or suggesting that traces of the village community are around us on every side. The institution may be found perhaps in its fullest development, that is, in its earliest form, in India, but it has left its impressions firmly upon our modern law and on every society in Europe. Mr. Freeman has identified fragments of Teutonic society organized on the primitive model existing in the forest cantons of Switzerland. Von Maurer has found ancient Teutonic agricultural customs and forms of property in land occurring in the more backward parts of Germany, which are clearly derivable from the same source. Mr. Freeman, following up the researches of Von Maurer, has shown how the politics of the Mark have become the politics of the parish vestry. And now Mr. Maine, following the example of Von Maurer and Nasse, and profiting by their researches, discusses the question how far traces of the

early village community are to be found in our own country. His conclusion is that the village community of India exhibits resemblances to the Teutonic township, traces of which are to be found in Switzerland, in Norway, Sweden, Scotland, England, and Germany, which are much too strong and numerous to be accidental, and that where the institutions differ, the differences may be at least plausibly explained. Mr. Maine thinks that the school of German writers on the subject have successfully shown that in England the primitive Teutonic proprietary system had everywhere a tendency, not produced from without, to modify itself in the direction of feudalism. But the traces of the village community which he points out, or rather suggests, in this country are very numerous. The ordinary division of the land held by the community in England, as elsewhere, seems to have been into three parts. One of these consisted of waste lands, another of pasture lands, and the third of arable lands. The first have connected with them in England a great number of customs which may possibly have descended from the early arrangement. The pasture lands seem to have belonged, as did all the rest, not to individuals of the community, but to the whole of the members in common. But the outsiders of the village, as well as those who had a right to a share of the arable lands, had the right to use the pastures after the crop of grass had been removed. At a particular day the lands were thrown open, the fences were broken down, and all had a right to pasture their cattle. The lammas lands seem to have been used in this way. The custom still survives, and has been abolished in many places only within the recollection of persons now living. The arable lands of the community were usually divided into three parts. Each one of these in succession was allowed to remain fallow for a year. The remainder was apportioned out among the householders, the householder being the true *paterfamilias* of English history. The division was probably often varied. Sometimes, also, though of course but rarely, the waste land for cutting firewood, &c., was varied, some of our present commons showing marks of having been under cultivation. Mr. Maine mentions that the great baulks of land separating the various portions of the arable land belonging to the community are in many places still visible.

We have said enough on this point to show that the book is singularly suggestive. It makes us envy the men who are to hear the lectures to which these are only introductory. Mr. Maine shows that the Indian village communities throw much light on the history of those of Europe. It will compel us to rewrite much of our history of real property. The theory laid down by our writers of text-books, that at the Roman conquest the land was divided among the nobles, who again subdivided, and that the land was dealt with practically much as it is now, will have to be abandoned. It was very simple and easy of comprehension, but after reading this volume we are afraid we must say that it is incredible. As we have already remarked, the lectures are introductory to a much longer course. Should this work out the views suggested by the opening lectures, the author will have succeeded in conferring

upon the history of jurisprudence a work of even greater importance than his "Ancient Law," and of the latter, it may be said that it is almost the only book in the language which an Englishman can point out to a foreigner as one which will bear comparison with the best of the works of continental jurists.

The Academical Study of the Civil Law. An Inaugural Lecture delivered at Oxford, February 26th, 1871. By James Brice, D.C.L., of Lincoln's-Inn, Barrister-at-Law, and Fellow of Oriel College; Regius Professor of Civil Law in the University of Oxford. London and New York: Macmillan & Co. 1871.

THIS lecture has for its object to point out the importance of a study of Roman law. The writer urges that England has lost much by discontinuing this study. It was shown in these pages that under Vacarius this country once had a chance of obtaining for the civil law a firm footing amongst us. But the bigotry of the time cut us off from that study, which, more than any other, would have linked our civilization with that of continental countries. Dr. Brice seems to regard this as an unmixed evil. We cannot admit this, though we are disposed to rate the importance of a study of Roman law as high as he does. We believe it to have been a real gain to western European thought that the whole of its modern legal literature should not have been cast in the same mould. Ours has had a distinctly national growth; and when future jurists write the history of comparative jurisprudence, they will have something to say in favour of the English system. That its excellences are not so conspicuous as those of the Roman system is a mere truism, but it has sufficed for our wants, and we have not had, nor are we likely to have, to break with all our ancient legal traditions, and reconstruct, or rather borrow, another legal system in the way that France and other countries have had to do, among whom the civil law took firmer root than it did among ourselves.

Still we *do* regard the present isolation of our juridical science as an evil, and we believe that much of the rigidity of our present system, much of the slavish adherence to precedent as gathered from decided cases, is to be accounted for by the fact that English lawyers have hitherto been acquainted only with their own system of law. The time has certainly come when every one who enters on the study of law should be made acquainted with some other system or systems. This being so, there is no other system which will bear comparison for a moment with that of Rome. It will enable him at once to become acquainted with the leading features of most of the modern codes, and it will make him acquainted with a body of jurisprudence which has succeeded in laying down a number of principles within the compass of which almost every conceivable case will fall. The author shows this very satisfactorily. We have great pleasure in commending his introductory lecture to the attention of our readers.

Fifty-third Annual Report of the Trustees of the New York State Library, Albany. The Argus Company. 1871.

WE have received the above report, which states that the library in question contained, at the close of last year, no less than 82,856 volumes, of which number 21,911 formed the law library. These have been acquired, some by purchase, and some by donation and exchange. The library has on its shelves, Hansard's Debates from the beginning, making in all 202 volumes, and the journals and sessional Parliamentary papers in 150 volumes. Valuable additions of British reports and law treatises have lately been made. The catalogue, which is voluminous, is interesting as showing a large collection of standard and current works of all countries.

Pacific Law Reporter. San Francisco. 1871.

THIS is a new weekly, and contains a digest of the latest legal information, gleaned principally from the American and English legal journals, for circulation among the profession in California.

The American Law Review, January, 1871. Boston: Little, Brown, & Co.

THE subjects treated of in this number are important. That on "Contraband of War" has been prepared with very great care, and shows on the face of it that the author had studied the subject deeply. Much has been written on the subject of late, and yet it is far from being exhausted. In times of peace it generally lies in abeyance, but as soon as war is proclaimed between nations the question crops up immediately, which previously had been allowed to die away without amendment. "Expert Testimony" is another article very interesting to the profession, it having taken the first prize at the Harvard Law School last year. "Burdens of proof in cases of negligence," and "*Ultra Vires*," with the usual summary of events and book notices, form the contents of this excellent number.

The Journal of Jurisprudence and Scotch Law Magazine. Edinburgh: T. & T. Clark, 1871.

THE parts for the last quarter contain the usual number of articles, besides the current events, notes of cases, &c. The articles, with two exceptions, are all on Scotch law subjects, the law of Hypothec being most prominent. This was the subject of recent inquiry, on which a Bill in the House was based, but which has been thrown out. An interesting biography of John Austin is commenced in the April number, and will be continued in future ones.

Albany Law Journal. Albany: Weed, Parsons & Co. 1871.

THIS very interesting journal maintains the position it has rapidly won for itself, both on the other and on this side the Atlantic. It is

one of the best got-up legal periodicals of the day, and much learning is displayed in its contents.

The National Bankruptcy Register. A Record of Law Reports and Proceedings in Bankruptcy in all the States. New York. 1871.

THIS bi-monthly periodical is what it purports to be in its title; and we have no doubt, although it relates exclusively to that one subject—bankruptcy, that it will be found exceedingly useful to practitioners generally. The cases are reported at considerable length.

Lord Lieutenant and High-Sheriff. 1870.

THIS is the subject of a little reprint from the *Oxford Journal*. Mr. Disraeli states in his "Lothair" that there is no doubt the High-Sheriff takes precedence of every one, even the Lord-Lieutenant. Mr. J. M. Davenport has undertaken to repel this assertion, and to affirm "that the Lord-Lieutenant, as *locum tenens* of the Sovereign, has precedence of every one in the county, and that the High-Sheriff does not, under any circumstances, precede the Lord-Lieutenant, nor socially take precedence of any peer." The contrary view, he says, was derived from a misinterpretation of a dictum of Chief Justice Coke, and refers to a pamphlet of Sir Charles Young, Garter King-at-Arms, printed in 1860, in the preparation of which he had some share.

PUBLICATIONS RECEIVED.

The Law Times.

The Irish Law Times.

The Law Journal.

The Canada Law Journal.

The Australian Jurist.

The United States Jurist.

La Revue Legale, Recueil de Jurisprudence et d'Arrêts, Canada.

Events of the Quarter, &c.

CODIFICATION OF THE LAW.

THE following is the reply of Mr. David Dudley Field, of New York, to an invitation from some members of the Californian Bar to deliver an address at San Francisco on the subject of Law Revision, Codification, and Reform. The subject has been dealt with at considerable length in former numbers of this magazine, and in another part of this number will be found an article relating to the letter in question :—

“NEW YORK, *November 28, 1870.*”

“GENTLEMEN,—Your letter of June 28th was handed to me in San Francisco as I was on the point of leaving, else I should certainly have accepted your invitation. I promised, instead, to give you in writing something that I should have said, but, until now, I have not had leisure to write all I wished.

“You are already familiar with much that has been done in this State in the way of codification. In some respects, indeed, you have gone beyond us. For though New York has caused the preparation of a code, or series of codes, of the whole body of the law, divided into five portions, and known as the civil code, penal code, political code, code of civil procedure, and code of criminal procedure, she has enacted only a portion—about a third—of one of the five, while California has adopted two of them; that is to say, the codes of civil and criminal procedure, in nearly their completed state. Your example has been followed by the other Pacific communities—Oregon, Nevada, and Washington—and by nearly all the inlying territories between the sea and the Mississippi.

“Why New York has paused in the work of law reform, it would not be difficult to explain. The pause, however, is not likely to be of long duration. It requires no prophet to foresee that our people, with all the other English-speaking communities, will yet insist upon having the whole body of their law in a form accessible and intelligible to all who are governed by it. Whether New York will keep the lead depends upon herself. In one respect, indeed, she has already lost it, for the honour of being the first to enact a code of the common law of England belongs, not to England nor to New York, but to Dakota, one of the youngest, but most vigorous of our territories.

“That a general and comprehensive code of the principal branches of the law is very much needed, is, to my mind, most evident. I know that many hold to the opposite opinion, but this opinion appears to me rather the prepossession of lawyers in favour of things as they are, than the result of reasoning.

“Our law is in a state of chaos. Nothing will bring it out of chaos

but a code. These two propositions, if true, are decisive of the question of general codification. For the truth of the first, I appeal to you, and to every lawyer of experience or study. Look at our libraries, listen to the arguments at the bar, read the decisions from the bench.

"Taking at hazard a volume of California reports, the 23rd, I have asked a friend to tell me how many cases are reported in the volume, how many citations of authorities there were, and the sources from which they were derived, and he has informed me that 153 cases are reported, that the citations were 1394, being on an average of nine to each case, and that they were derived, 683 from California, 277 from New York, 120 from England, 110 from Massachusetts, 43 from the federal courts, and the rest in unequal numbers from twenty-two different states. And as I like upon occasions to fortify myself with the authority of great names, I take the following passage from a pamphlet published last spring by the present lord chief justice of England, in which, referring to the proposed revision of the English law, he says: 'We seem to be making no progress whatever toward reducing to any intelligible shape the chaotic mass—common law, equity law, crown law, statute law, countless reports, countless statutes, interminable treatises—in which the law of England is, by those who know where to look for it, and not always by them, to be found.'

"The truth of the second proposition, will, I think, appear upon a little consideration. The chaotic state of the law arises, of course, from the vast mass of unarranged, and some times discordant, material. To take this material, separate the discordant parts, analyze, arrange, compress, remould the rest, is to educe order out of chaos. The result is a digest or a code. The difference between the two is so well stated by Mr. Justice Willes, in his dissent from the second report of the English digest of law commission, that I will quote the whole, as follows:—

"'I respectfully dissent from the report, for the following reason: Because, fully agreeing that a first-rate, modern digest of English law is to be desired (for professional use), I think it will, when made, after all, be only a makeshift for a code, or rather series of codes. Quite apart from the authority and example of so many other countries, which can hardly all be mistaken, a code is preferable to a digest in many points of view. A digest gathers and compiles what has been decided and ordained, and, amongst other relics, it will preserve the conflicts of common law and chancery and the rest; whereas a code must needs, once and for all, lay down uniform rules of justice to govern every court. Thus a code will swallow up at once mischiefs of detail, the instances of which would choke a digest. Moreover, a digest will be limited to English reports and treatises, and so far as regards affairs peculiarly our own, such as real property, this exclusion of foreign systems may be tolerable enough; but as to mercantile and maritime affairs, there will be so much opportunity for choice and improvement thrown away. It seems even possible that a really well-considered code, not restricted to a digest

of our own jurisprudence, but embodying improvements suggested by a comparison of our own laws with those of other countries, might contribute something to a great object—the gradual formation of international mercantile and maritime law.’ This short statement is, to my thinking, an unanswerable argument. The experience of the English commission is another. In its first report, dated in May, 1867, it expressed the opinion ‘that a digest of law is expedient,’ and, in regard to the means of procuring it, recommended ‘that a portion of the digest, sufficient in extent to be a fair specimen of the whole, should be in the first instance prepared.’ Pursuant to this recommendation, three members of the bar were selected to prepare specimen digests, embracing the subjects, first, of bills of exchange, including promissory notes, bank notes and checks; second, of mortgages, including liens, and third, of rights of way, water and light, and other easements and servitudes.’ But the second report of the commission, dated in May of the present year, holds the following language: ‘The gentlemen whose assistance we have had have laid before us materials of considerable value, and have enabled us to form conclusions as to the conduct of the entire work. But we think it unadvisable to continue any further this mode of proceeding.’ The appointment of a permanent commission was then recommended. It is to this report that the dissent of Mr. Justice Willes was appended. One of the three gentlemen selected to prepare the specimen digests has since addressed a letter to the lord chancellor on the subject of codes and digests, in which he says ‘that the digest commission, judging from the completed part of the specimen digest which I was commissioned to prepare, or from those framed by my learned colleagues, concluded that it would fill a hundred volumes.’

“It is easy to see why a digest should be of inconvenient length. Being a collection of adjudged cases and legislative enactments, the different parts will run into each other, and must needs be full of repetition and contradiction, while the code is a digest reduced to its elements, where nothing is repeated, and each principle is taken by itself and ranged with cognate principles only. To illustrate by example; a treatise upon bills of exchange will be sure to contain also the law of contracts, as applicable to bills, and refer to thousands of adjudged cases; in like manner, a digest will contain a citation of those cases, and notes of the points decided in each; while a code will send to the chapter on contracts all that relates to contracts, and retain in the chapter on bills only what is peculiar to them. In this way the hundred volumes of digest may be reduced to five volumes of code.

“I have thus endeavoured to show that, in the present state of our law, a code is a necessity. But if it were not necessary, it would, in my opinion, be expedient for several reasons. It would reduce the laws of the land to an accessible and intelligible form, and thus bring them within reach of the people, who are to regulate their own conduct by them, and who should be able, in great measure, to judge for themselves of their legal rights and duties. It would enable the legislative department to make intelligently those reforms

which all believe to be needed, to lop off unsatisfactory or superfluous rules, and reconcile conflicting ones, changes which can be effected only by simultaneous and comprehensive legislation. And it would lessen the labour of judges and lawyers, enabling both to dispense with the larger number of those books which now incumber the shelves of their libraries.

"But great as are these advantages, some will say they are overcome by certain disadvantages, the chief of which are the supposed inability of a code to provide for the future, its supposed uncertainty, and its supposed inflexibility.

"To the first objection, it may be answered that a code will provide for the future as well as law in any form is capable of doing it. If there be any law, written or oral, it can be stated in words and placed in a code. The objection means nothing, unless it assumes that the code will undertake to exclude all law except that which it contains, an assumption not founded in fact. The civil code prepared for New York does not profess to contain all the law. 'All that it professes is, to give the general rules upon the subjects to which it relates, which are now known and recognised, so far as they ought to be retained, with such amendments as seemed best to be made, and saving always such of the rules as may have been overlooked. In cases where the law is not declared by the code, it is to be hoped that analogies may, nevertheless, be discovered which will enable the courts to decide. If, in any such case, an analogy cannot be found, nor any rule which has been overlooked and omitted, then the courts will have either to decide, as at present, without reference to any settled rule of law, or to leave the case undecided, as was done by Lord Mansfield, in *King v. Hay*, 1 W. Bl., 640, trusting to future legislation for future cases.' 'Therefore, if there be an existing rule of law omitted from this code, and not inconsistent with it, that rule will continue to exist in the same form in which it now exists; while if any new rule, now for the first time introduced, should not answer the good ends for which it is intended, which can be known only from experience, it can be amended or abrogated by the same law-giving department which made it; and if new cases arise, as they will, which have not been foreseen, they may be decided, if decided at all, precisely as they would now be decided, that is to say, by analogy to some rule in the code, or to some rule omitted from the code, and, therefore, still existing, or by the dictates of natural justice.'

"The second objection of supposed uncertainty rests upon this argument: that after every effort to condense, arrange, and make plain, language will still be liable to different interpretations. But condensation and arrangement do not conduce to uncertainty. On the contrary, they are the best help to perspicuity. All language is liable to misconstruction; that, however, is not an objection to the use of language. Every line of the statute of frauds, said a great English judge, is worth a subsidy. But was there ever a statute so loaded with interpretation and commentary? The constitution of the United States is a most beneficent instrument; but, after eighty

years, the courts have not yet done with deciding upon its construction.

"The third objection of supposed inflexibility has as little merit as the other two. It means, of course, that when the courts decide, without a code, they have greater liberty of decision than with it, and that this liberty is a good thing. The answer to the objection is, first, that such a liberty, if it existed, would not be a good thing. No judge should have power to decide a cause without a rule to decide it by, else the suitor is subjected to his caprice. The second answer is, that the courts have not greater liberty to decide right without a code than with it. The rules which govern the judges in their decisions are contained in precedents. A code is a collection of the general rules thus contained.

"Another way of stating the objection is, to say that while the common law is expansive, a code does not expand or adapt itself to the expanding exigencies of society. A different phrase for the same idea is, that the common law is elastic and accommodating, and that a code will be the opposite. Now, to say that a law is expansive, elastic, or accommodating, is as much as to say that it is no law at all. The real significance of the objection, if it has any significance, is, that it is better to let the judges make the law as they go along, than to have the lawgiver make it beforehand. For, if the judges are to decide according to known rules, those rules can be written by the lawgiver as easily as they can be spoken from the bench, or taken down by the reporters. And even though, in particular cases, the judges should fail to find such rules, and should have to make rules as the cases occur; that, too, can be done as easily when the known rules are placed in a code, as when they repose in the breasts of judges, or in the leaves of reports. So long as a code is confined to the rules of law as they now exist, it is neither more nor less expansive than the common law. When the inquiry concerns new cases, it is divisible into two parts, one relating to those cases which are foreseen, and the other to those which are not foreseen. Those which are foreseen the lawgiver can provide for, and it is his duty to provide for them. Those which are not foreseen cannot be provided for, except by directing the courts to decide according to the analogy of existing rules, when there is such an analogy; and, when there is none, then to decide according to the dictates of natural justice."

"These considerations serve to show that even an old community like England cannot get on much longer without a code. How much stronger is the argument in respect of a community like yours! Even New York has not half the impediments in the way of reform that obstruct the path of England; but California has scarcely none at all. A state yet in its infancy—for twenty years mark only the beginning of life in political institutions—can make or reform its laws without infringing upon vested interests or ancient prejudices, or the usages of generations. For such a state, before all others, there cannot be a doubt about the advantage of putting all its laws into a written and systematic form; in other words, making codes of

them. To import into such a state the chaotic mass which is called the law of England, is like bringing over from beyond the sea a half-ruined house to dwell in, instead of building for ourselves.

"In looking about for plans or models, perhaps you will look at the civil and penal codes which have been prepared for New York. It may be natural for you to do so, since you have already adopted our codes of civil and criminal procedure, parts of our system, and that fact may induce you to look at the rest. It would be sheer affectation in me to appear indifferent about the opinion you may form of their fitness to serve you for examples. I am very sensible of their defects; I know better than any one else what an amount of labour they have cost, and how impossible it is that they should not show mistakes and omissions. Nor have I forgot the eloquent protest of Macaulay, prefixed to the draft of the penal code for India. 'To the ignorant and inexperienced, the task in which we have been engaged may appear easy and simple. But the members of the Indian government are doubtless well aware that it is among the most difficult tasks upon which the human mind can be engaged; that persons placed in circumstances far more favourable than ours have attempted it with very doubtful success; that the best codes extant, if malignantly criticised, will be found to furnish matter for censure in every page; that the most copious and precise of human languages furnish but a very imperfect machinery to the legislator; that in a work so extensive and complicated as that in which we have been engaged, there will inevitably be, in spite of the most anxious care, some omissions and some inconsistencies, and that we have done as much as could reasonably be expected of us if we have furnished the government with that which may, by suggestions from experienced and judicious persons, be improved into a good code.'

"Emboldened by this opinion, and bespeaking no less indulgence, I will venture to recommend to you the civil and penal codes prepared for New York. I am certain that they are far better than no code at all, that the general plan upon which they are constructed is right, and that whatever errors experience may make apparent in the execution are susceptible of simple and easy remedy.

"They have been now three years published, during which time you may have seen many criticisms, friendly and unfriendly. But this, I think, you will have observed, that the unfriendly criticism comes principally, if not exclusively, from those who do not desire to believe in a code at all, and who disprove and reject the codes of civil and criminal procedure which you have thought it wise to adopt, and with which, if I am not misinformed, you are quite satisfied. Indeed, I think I may say that hostility to the proposed codes goes hand in hand with hostility to the union of law and equity, and to all codification.

"This hostility, it is true, does not greatly trouble me, who have seen the code of civil procedure treated in New York, first with derision, and then with hate; ridiculed, vilified, dreaded, misconstrued, but winning its way all the while, till the opposition to it has dwindled to insignificance; who have seen the principle of the same

code winning, in England, first attention and then assent, till a bill, founded upon the same theory and aiming at the same ends, has passed the House of Lords, under the advocacy of the lord chancellor. Let me quote three clauses of this bill :—

"1. 'Equity, or the rules and principles which govern the court of chancery in the administration of justice, shall henceforth be blended and united with the common law of England, and (so far as there is any difference) shall control and modify the same, and supply the defects thereof, to the intent, that henceforth there may be no division in the jurisdiction of the several courts, but that equity and common law, so united as aforesaid, may be administered in all the aforesaid courts without difference or distinction, and, in case of any conflict of jurisdiction, the jurisdiction which has hitherto been exercised by the court of chancery or by the court of admiralty shall prevail from time to time.

"2. 'Every right of suit or action, and every ground of a title to relief, now recognised by or capable of being enforced in any court of equity, shall, subject to any rules of court made in pursuance of this Act, be recognised by and enforced in the high court of justice, and every divisional or other court thereof.

"3. 'Any answer, plea, or defence in any suit, action, or other civil legal proceeding, which has hitherto been available in any court of equity, shall, subject to any rules of court made in pursuance of this Act, be available in the high court of justice, and in every divisional or other court thereof.'

"Now, let me show you what the chief justice of England, writing of this bill, declares concerning the fusion of law and equity : 'No man can be more sensible of the discreditable anomaly which the distinction between law and equity produces in our jurisprudence. I have long felt that the existence of two distinct, and, in many respects, antagonistic, systems of law—"of two systems of judicature," to use the language of the commissioners, organised in different ways and administering justice independently of one another, on different, and sometimes opposite, principles—of rights acknowledged in the one system, rejected or controlled in the other—is a standing reproach to our law, as that of a wise and enlightened people, which ought not any longer to be endured. I concur most cordially in thinking that this anomaly ought to be removed, and law and equity made one. I agree that, in whatever courts or departments of our judicial organisation justice in particular cases may be administered, one uniform system should prevail, and all conflict of law or jurisdiction be impossible.'

"Among the objections made to the civil code prepared for New York, is one, of which I will here take notice, merely observing in respect of the rest, that they are of less importance, and relate chiefly to verbal corrections and matters of detail. This objection is, in substance, that compression has been carried to excess, and the code is too short. By this, I suppose, is meant, that too few rules have been given. Now, as the avowed purpose was to give only general rules, the objection must be, either that the purpose was wrong, or

that, the purpose being right, there has been in the execution of it an omission of something which, according to it, should have been inserted, that is to say, of important general rules. As to the purpose, all that I need answer is, that *a code* was intended, which is, in its very nature, a collection of general rules. If a *digest* only had been proposed, there would have been undertaken, not a collection of general rules of law embraced in one volume, but a collection of decisions and statutes extending through many volumes, just what the English are now proposing. As to the execution of the purpose, I can only say that, if any important general rules have been omitted, they can be pointed out and inserted; and, until that is done, no great harm can happen, since all existing rules, omitted from the code and not inconsistent with it, are saved and remain still in force; the repealing section being that "all statutes, laws and rules heretofore in force in this state, *inconsistent with the provisions of this code*, are hereby repealed and abrogated."

"But let us see how far this assumption of unnecessary compression is justified by the fact. We may satisfy ourselves in one of two ways, either by pointing out the rules which have been omitted, and should have been inserted, or by comparing this code with others. As to the former, I leave the critics to put into words what they would have had inserted; as to the latter, I will compare the New York codes with the most famous codes of the modern world. In doing so, it should be borne in mind that certain subjects, placed by the federal constitution specially under the charge of the federal government have hardly a place in the codes of the States; as, for example, shipping, navigation, bankruptcies, copyrights, patent-rights, admiralty, and maritime jurisdiction. There are three methods of comparison; first, by comparing all the New York codes with all the codes of a foreign State; another, by comparing our civil code with some other civil code; and the third, by comparing particular subjects as treated in the different codes. Now, let us compare, first, all the codes of New York with all the codes of France. The civil code of New York has 2034 articles (called sections); the penal code, 1071; the political code, 1126; the code of civil procedure, 1885; and the code of criminal procedure, 1054—in all, 7160. The five French codes have the following number of articles; the code civile, 2281; the code de commerce, 648; the code penal, 484; the code de procedure civil, 1042, and the code d'instruction criminelle, 643—in all, 5098. The New York codes, therefore, have, altogether, 2072 more articles than the French.

"If it be objected to this comparison that the political code ought not to be counted because there is nothing analogous to it in the French, I answer that this is not entirely so, since the political code has provisions respecting domicile, the promulgation of statutes and the like, which subjects are provided for in the French civil code; but, leaving the political code out of the question, and deducting its 1126 articles, there will still remain in the four other New York codes forty-six more articles than in the five of the French.

"Next, let us place the civil codes alone side by side, and observe

with what result. Take the 281 sections of the French civil code, and add to them the 648 of the code of commerce, and we have in the two 2929. But we must eliminate the articles on subjects outside of the civil code of New York, or scarcely within its scope; that is to say, those in the French civil code on prescription, arrests, judicial sequestration, absentees, the respective rights of property of married persons, and the articles of the French code of commerce on bankruptcies and insolvencies, navigation, tribunals of commerce and the bourse separation of goods, prescription, traders, and their books of account, and we have a total of some 750 articles to be deducted from the 2929, leaving 2179 French against 2034 New York, making a difference of only 145 articles more in the two French codes, civil and commercial, than in the civil code of New York.

"Turning, now, to the civil codes of other nations, we find that of Sardinia to have 2415 articles, that of Russia 1471, and that of Austria 1502. I do not say that these comparisons are exact as to the relative amount of material in the different codes, since the articles are often differently arranged, and the modes of expression vary; but they show approximately the measure of condensation in each.

"But thirdly, a comparison still more exact may be made by taking the spaces given to particular subjects in the two systems. Thus, the subject of bills of exchange and other commercial paper is disposed of by the French code in 80 articles, while the New York code gives 117 to the same subjects. In the French code, insurance, average and contribution have 98 articles; in the New York code, 167. Partnership, including mercantile corporations, has in the French code 47 articles; in the New York code the two subjects have 124. Property, real and personal, with all its incidents, modes of enjoyment and transfer, extends through 585 articles in the French code, and in that of New York through 511, including the 50 on corporations. There is, besides, a feature of the New York code not yet mentioned, which adds to its value, and that is, the reference to adjudged cases at the end of the sections. This gives to the code many of the advantages of a digest combined with a code. Those references are designed to justify and explain the text. If, instead of reference, the point decided in each case were stated, the approach to a digest would be very close; since it is not necessary to a modern digest, any more than it was to the Roman Pandects, that all the decisions or opinions should be collected, but only such as are material to an understanding of the law.

"I need extend the comparison no further. Enough has been shown to make it certain that the charge of too great compression, if good against the proposed civil code of New York, is equally good against all the modern codes.

"In conclusion, let me take the liberty of exhorting you to proceed, with the accustomed energies of Californians, and with all practicable dispatch, to prepare and enact codes of the whole body of your law. If, in doing so, you can make use of those prepared

for New York, I shall certainly be gratified; if you can improve upon them, so much the better. You have a commission, now sitting, able to prepare the work for your legislature; and that body, I trust, will not let pass the great opportunity of making itself the lawgiver of not only the half million of people now within your borders, but the future millions who are to succeed them, and, not only those, but, by force of their example, the vast population of the whole Pacific regions, for all time to come.

“With great respect,

“Your most obedient servant,

“DAVID DUDLEY FIELD.”

TESTIMONIAL TO MR. H. POWNALL.

A VERY numerous meeting of magistrates of the county of Middlesex has been held at the Sessions House, Clerkenwell, to present a testimonial to Mr. Henry Pownall, late chairman of the magistrates, who filled that important position for twenty-six years, and who retired in July last, of the value of 500 guineas, as a token of their regard and esteem for him, and as an acknowledgment of the services he had rendered the county during the time he had presided over them. Lord Ebury having been called to the chair expatiated at great length on the merits of Mr. Pownall, who had so long and so honourably occupied the chair. He alluded to the arduous duties of chairman of the Court of Middlesex Sessions, which transcended any other counties in the importance of its duties, and taxed most severely the energies of him who had to preside over them, but under the auspices of Mr. Pownall the business of the county had been transacted in a way that might challenge comparison with any other bench or body in the country, and although it was all transacted in open court, with all the vigilance of the press brought to bear upon it, their proceedings had drawn forth a smaller amount of criticism than those of any other public body. After some other observations, the noble lord presented the testimonial, which consisted of a dessert service in bright and frosted silver, and a large and massive silver tea-tray, both engraved with the arms of Mr. Pownall, and an inscription.

Mr. Pownall, in reply, said: I am sure there is no one present who will not admit that it is far more easy to listen to the kind observations of our noble chairman than for any individual to return thanks for them. Your lordship has been pleased to allude to my services, and to recall to our minds periods long passed away. It is a great satisfaction in reviewing the work of more than a quarter of a century in which I have been engaged, more or less for the benefit of the county, to receive this splendid mark of your esteem and approval. Your approval of the manner in which I have aided you in effecting highly important alterations in your county establishments is very gratifying to me, and will, I trust, continue to afford you and the public satisfaction long after I have passed away. To enumerate the various works in which we have co-operated together would occupy more time than is expedient on this occasion, and I will only

allude to the silent system in your prisons, the amelioration of the condition of the poor lunatics, and the separation of the male and female establishments of your prisons, by which many thousands every year have been saved to the county. Not the least of your benevolent efforts has been the extension of the term for the repayment of borrowed money from fourteen to thirty years, by which a saving has been effected of upwards of 40,000*l.* a year, thus far diminishing the burdens of the ratepayers of the county. These and other measures I contemplate with the greatest satisfaction, nor can I on such an occasion forget the explosion at Clerkenwell, by which from the directions I gave the escape of Burke was prevented, and the mutilation of sixty or seventy prisoners was avoided. These and other labours I contemplate with great pleasure, but whatever pleasure your approval of my services may afford me, the assurance of your personal esteem is the most welcome of all. To have worked with you so constantly and so long, and still retain your esteem and regard, will afford me satisfaction and gratification for the rest of my days, while the magnificent testimonial which you now present, records your sentiments of esteem and appreciation of my services, and will remind my children, and my children's children, of the kind feeling with which, for so many years, I was associated with the magistrates of this great county.

UNIFORMITY OF SENTENCES.

The following resolution has been passed by the Gloucestershire bench of magistrates, on the motion of Mr. Barwick Baker, seconded by Mr. Serjeant Pulling:—

“That the Court of Quarter Sessions, assembled at Gloucester on Jan. 3rd, 1871, recognise the expediency of adopting a general rule as to sentences for felony, which, while making allowance for exceptional cases, may secure an uniformity of practice intelligible to the public and deterrent to those likely to fall into crime; and that the following suggestions be recommended for adoption:—(1.) That when any prisoner is apprehended on a charge of felony, the police be instructed to endeavour to ascertain his antecedents for the last five years, and to enter them in the form provided for the purpose. That if these cannot be ascertained at once, and the evidence on the hearing appear to the justices sufficient for a commitment, the prisoner be remanded for further examination, as recommended by the late circular from the Home Secretary, and the truth of any statement the prisoner may make be inquired into by the police. But that if no antecedents be shown within a reasonable time he be (as a general rule) committed for trial by indictment. (2.) If a prisoner against whom a charge is proved appear not to have been previously convicted of felony they would suggest that he should be summarily dealt with, and receive a light sentence—as for a first conviction—namely, ten days or not exceeding a month, unless in exceptional cases, such as previous bad character, large amount of injury inflicted on the prosecutor, or circumstances showing the prisoner not to be inexperienced in crime. But if it should appear

that the prisoner has been previously convicted of any felony or indictable misdemeanour, it should be remembered that by the 24 & 25 Vict. c. 96, such prisoner is liable to penal servitude, and cannot *legally* be dealt with under the Criminal Justice Act. (3.) When such prisoner shall be committed, the governor of the prison, or some officer appointed by him, shall offer to the prisoner every facility for affording any such references as may be to his advantage in proving honesty of life. Careful inquiries shall then be made by the governor or by the police, and the replies shall be communicated to the prisoner, and also to the judge before passing sentence. (4.) That it be considered the duty of the governor of the gaol, with the assistance of the police, to make inquiries whether any previous conviction of the prisoner be known, and if so to give information of the fact to the superintendent of the police of the district where the offence was committed. The superintendent shall forward the information to the prosecutor or his attorney, who shall take care that the evidence necessary for proving it be produced at the trial, as the case will not be complete without it. The court desire that it should be made known that a sentence for felony after a previous conviction for felony will, unless in very exceptional cases, be one of not less than six months' imprisonment with seven years' police supervision; and also that where two previous convictions are shown, and where a sentence for six months' imprisonment or more has been undergone, it will generally be deemed that lighter sentences have failed in checking the habit of crime, and that a sentence of seven years' penal servitude is necessary."

GRAND JURIES.

At the last Sessions of the Central Criminal Court, the grand jury, after having disposed of the whole of the cases submitted to them, made the following presentment to the Recorder:—

"We, the grand jury assembled at the Sessions House, Old Bailey, this 5th April, do hereby respectfully represent that in our opinion the office we have been called upon to occupy is useless, and ought as speedily as possible to be abolished.

"We consider that the ends of justice are not served by the presentation of indictments before us after the decision of the magistrates, who have had the advantage, in the hearing of each case, of the legal assistance engaged by both parties.

"The consideration of the evidence adduced in the support of the indictments proves how carefully the evidence pertaining to each charge is taken at the time of the committal, and the necessary indorsement of the grand jury under the present system appears to involve a reflection on the decision of the magistrates, and a useless sacrifice of valuable time on the part of the jurymen.

"We therefore beg respectfully to express our hope that steps may be speedily taken to abolish altogether the said office."

The Recorder.—"Is it the unanimous opinion of the grand jury that your duties may be dispensed with, having regard to the particular circumstances of the metropolis, or rather of this district?"

The Foreman.—“Yes.”

The Recorder.—“I will take care that it shall be at once forwarded to the Home Secretary.”

The grand jury were then discharged.

SCOTCH LAW REFORM.

It is now almost universally acknowledged that further reform in professional education and professional reorganization and regulations, if it must not preclude, must at least accompany any beneficial change in the Scottish judicature and forms of process. A fresh proof of this is given by a Memorial which has just been sent to the Lord Advocate by a large number of procurators in Glasgow, Aberdeen, Airdrie, Ayr, Dumfries, Dunfermline, Dundee, Greenock, Hamilton, Kilmarnock, Perth, Linlithgow, Stirling, and other towns, asking his Lordship to introduce a Bill “for the extension of the rights of procurators in the inferior Courts of Scotland.”

The Memorial humbly sheweth—

“That the Law at present existing in Scotland, whereby procurators are excluded from practising in any inferior Court to which they have not been specially admitted, is a public and professional grievance which it is desirable to remedy.

“That an almost unanimous desire exists among the legal practitioners throughout the country that a restriction so opposed to sound policy and equity should be removed.

“That your Memorialists have, therefore, viewed with satisfaction the recommendations of the Royal Commissioners appointed to inquire into the Law Courts of Scotland on the subject.

“That your Memorialists consider the passing of an Act of Parliament, giving effect to these recommendations, would effectually remove the grievance complained of.”

And it prays for the introduction of a Bill for this purpose into Parliament early in the present Session.—*The Journal of Jurisprudence and Scotch Law Magazine.*

THE LATE WILLIAM SIDNEY GIBSON, ESQ.

WE take the following from an obituary notice of Mr. Gibson in *Colburn's New Monthly Magazine*, who died on the 3rd of January last. Mr. Gibson was born at Parson's Green, Fulham, in 1814. Called to the Bar by the Honourable Society of Lincoln's Inn in 1843, he was appointed by the late Lord Lyndhurst to the office of Registrar of the Newcastle-upon-Tyne District Court of Bankruptcy in the same year, and he continued to discharge the duties of this office till the abolition of the Court in 1870. Mr. Gibson was a Fellow of the Society of Antiquaries, London, of the Geological Society, of the Royal Society of Antiquaries of the North Copenhagen, and an honorary member of the Academie des Sciences et Belles Lettres de Dijon. The degree of M.A. was conferred upon him by the University of Durham in 1857, in recognition of his contributions to the literature and archæology of the north of England. His first considerable work was the elaborate “History of the

Monastery of Tynemouth," published many years ago, and which was followed by many minor productions. Among which "An Historical Memoir of Northumberland," "Descriptive and Historical Notices of Northumberland Castles, Churches, and Antiquities," "Dilston Hall, or Memoirs of James Radcliffe," "Remarks on the Mediæval Writers of English History," "A Memoir of Richard de Bury, Bishop of Durham and Lord Chancellor," &c., &c. Only a few weeks before his death he had undertaken the editorship of an important work, and he looked forward to it with much satisfaction for the occupation of his leisure hours. By his own wish he, the historian of Tynemouth Priory, now rests in its hallowed ground beside the remains of his mother. He was a zealous antiquary and archæologist, and whatever he has penned upon these subjects will remain as monuments of his industry, intelligence, and excellent taste. He was, also, a practical geologist and a true naturalist—not in the sense of a mere classifier, but of a thoughtful observer, and a loving and sympathising admirer of nature and of nature's works. His tone of mind was philosophic, his habits of thought were controlled by a wide-spread knowledge and a cultivated taste, and nowhere do these gifts, chastened by study and observation, appear to greater advantage than in his numerous contributions to our pages. His writings deserve to be collected, and will, no doubt, be republished.

SIR MAZIERE BRADY, BART., P.C.

To many the death of the Right Hon. Sir Maziere Brady, Bart., has been a source of very sincere regret, and to not a few a subject of surprise. The illness of the esteemed gentleman was not generally known. He died at his house in Pembroke Street, on Thursday evening, April 13th, in the 75th year of his age. His career was remarkable for its steady, consistent, and unswerving integrity. He possessed three noble qualities—strong common sense sterling as that of a Franklin; a firmness of purpose and plainness of speech as characteristic as those qualities were in William Cobbett; and sincerity in friendship, not forgetting those whom he knew in earlier and less distinguished years. Courteous, affable, and approachable at all times, his fine common sense made him humble, and considerate for the feelings of others; he neither chilled those who approached him by affected superiority, nor embarrassed them by pompous dignity. Hard work and an honest discharge of duty were his mottoes. Like many men of the same mould, he never left to genius to achieve by capricious efforts that which hard work alone can accomplish. He was born in the year 1796, and was educated in Trinity College; his studies there were marked by assiduity and ability, and gave promise of those attributes which rendered him remarkable at the Bar. Biography affords many examples of lawyers who attained to high positions in their profession, having given promise of great poetical powers. Some of these gifted men kept the dangerous gift in abeyance, believing that "Lady Law must lie alone." Sir William Blackstone bade farewell to the Muses in terms of refined and passionate regret, but preserved in his "Com-

mentaries" the fragrance of a highly-cultivated taste in thought and diction. Sir John Davies, who was the Law Officer in Ireland of James I., and a lawyer profound and painstaking, kept in his soul the green spot of poesy, and left to posterity poems that have a philosophy that instructs, and a sweetness of versification that charms. The worship of the Muses was neither unworthy nor unproductive in another celebrated instance—Hussey Burgh, who likewise was Chief Baron of the Court of Exchequer, the "silvery-tongued orator," the friend of Grattan, and one of the most illustrious of the phalanx of 1782. These were great examples, worthy to be studied and followed, of men who did not suffer the divine flame that burnt within them to interfere with the attainment of that exalted position in their profession at which each aimed, and brilliantly or steadily reached. Temperament often decides a man's career. Mr. Brady was blessed with a hale constitution; he was not beyond the ordinary size, but was strongly made, fitted for hard work in a profession requiring all the energies of soul and physical powers to push him through the ambitious ranks that might impede or oppose him. Literary as his tastes were, there were men amongst his contemporaries who surpassed him in the graces of elocution, while few were equal to him in a free and forcible mode of giving expression to his opinions, and of simplifying complicated matters of fact. He had the great advantage of having been called to the Bar at an early age—that event took place in the year 1819, when he was in his twenty-third year—and having been well grounded in the rudiments of his profession, and possessing something more substantial than an agreeable experience of English cookery in Lincoln's Inn, or the Middle Temple, he made his way as a lawyer, and displayed those qualifications that adapted him to hold a high place. As a black letter lawyer he distinguished himself, and few equalled him in his knowledge of the Common Law. He was fortune's favourite—few men rose more rapidly when once his foot got firmly planted on Fame's ladder, and few succeeded in acquiring more money. The various offices which he held enabled him to do this—as Solicitor-General (1837), Attorney-General (1839), Chief Baron (from 1840 to 1846), Lord Chancellor of Ireland (from 1846 to 1852, from 1853 to 1858, and from 1859 to 1866), during the administrations in which Russell, Aberdeen, and Palmerston were Prime Ministers.

His political career deserves notice. Though descended from a Protestant family, he embarked not in the politics that might have promoted him rapidly, at a time when Toryism reigned, and Eldon was Lord Chancellor of England, but on those liberal views and seemingly unpromising principles that had elevated Conservatives to the Bench. Rash as the venture appeared to be, his sagacity reaped its reward in time, and he who might have been the martyr of a false move in the game of life, eventually turned up not one, but, successively, many trump cards. We have heard it stated that he had no great relish for being transplanted from the congenial regions of Common Law, as Chief Baron of the Court of Exchequer, to the realms of Equity at the other side of the Hall, even though the

Great Seals and the Woolsack might compensate him for the exchange. But one who possessed the greatest influence ever enjoyed in Ireland—O'Connell—was anxious that the merits of Mr. Pigot should be acknowledged and rewarded with no less a place than that of a Chief of one of the Courts, and he induced or prevailed upon Mr. Brady to relinquish the Exchequer, and accept the Chancery. The place was offered to Doherty, but he did not care to abandon the Chief Justiceship of the Common Pleas, nor would Charles Kendal Bushe give up his high office in the Court of Queen's Bench, and ultimately—so the story goes—Maziere Brady accepted the Lord Chancellorship of Ireland, and David R. Pigot became Chief Baron. That O'Connell should have a claim in nominating one whom he felt disposed to honour and promote, as a successor to the Chief Judge of the Exchequer, may be inferred from the fact that when offered the post himself he refused it, preferring to devote himself to the service of his country in the troubled sphere of Irish politics, and to contribute to the attainment of those popular measures for his share in which "the tribute" was no unworthy compensation. The field of action in which Mr. Brady was brought most prominently forward was the Commission issued in the fourth year of the reign of William IV. (1833), for an inquiry into the state of the municipal corporations of Ireland. The Commissioners, in whom, to quote the words of the Commission, the King reposed "great trust and confidence for their zeal, ability, and discretion," were Louis Perrin, Serjeant-at-Law, James Moody, William Hannah, Maurice King, William E. Hudson, Acheson Lyle, Maziere Brady, John Colhoun, R. Corballis, Philip Fogarty, David R. Pigot, Henry Baldwin, and Matthew R. Sausse. This Commission was the platform from which the able men in the foregoing list rose to fame and fortune. Some of course have been more distinguished than others, but none have been more fortunate than the honoured man who has just shuffled off this mortal coil, and must descend to that grave where all distinctions are levelled. In this hasty memoir, we must not omit to mention that the Right Hon. Maziere Brady was appointed to the office of Vice-Chancellor of the Queen's University, and won golden opinions for the manner in which he used to deliver to the students his annual address. He was twice married, and passed his latter years in the comparative retirement of social life. In the year 1869 a baronetcy was bestowed upon him in consideration of long and numerous services, legal and political.—*Irish Law Times.*

JOHN, BARON PLUNKET, Q.C.

LORD PLUNKET was born in the year 1793, and was called to the Bar in the year 1817, at the age of twenty-four. In 1837, he was admitted to the Inner Bar. He acted as leading counsel for the Crown, in Dublin, and on the Munster Circuit, and was specially noted for his skill and carefulness in drawing indictments. He was appointed Chairman of Meath, a Bencher of the King's Inns, and was the Father of his Circuit; and we fully agree in the eulogium

pronounced upon him by contemporary journals, that his memory will long be held in affection and respect by a large circle of old and sorrowing friends and relatives. He was one of the most amiable of men, inostentatious, courteous, and gentlemanly ; urbanity of manner, and integrity of mind, were characteristics with which all who knew him were familiar ; but we cannot associate with his mental endowments any of "the thoughts that breathe, and words that burn," that made his father so illustrious. He was indeed honest and earnest in the discharge of his duty, and, in this respect, he resembled him as to whose genius Bulwer has written, "Man has no majesty like earnestness." He died at the ripe age of seventy-eight.—*Irish Law Times*.

LORD BROUGHAM.

A MARBLE bust of the late Lord Brougham has been recently placed in the council chamber at Guildhall. It is regarded as an excellent representation of the distinguished statesman and scholar, and Mr. G. G. Adams, the sculptor, is highly complimented upon the success which has awaited his work.—*City Press*.

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Hilary Term, 1871.

At the final Examination of Candidates for Admission on the Roll of Attorneys and Solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—Arthur William Rooke, Edward Walter Hunnybun, Ernest Lloyd, James Henry Vant, William Kay.

The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books: To Mr. Rooke, the Prize of the Honourable Society of Clifford's Inn; Mr. Hunnybun, the Prize of the Honourable Society of Clement's Inn; Mr. Lloyd, Mr. Vant, Mr. Kay, Prizes of the Incorporated Law Society.

The Examiners have also certified that the following Candidates, under the age of 26, passed examinations which entitle them to commendation:—Charles William Cronshey, Edmund Copplestone Roberts, John Stephens Carter. The Council have accordingly awarded them Certificates of Merit.

The Examiners have further announced to the following Candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to Certificates of Merit if they had not been above the age of 26:—Alfred Taylor, Henry Wade, Philip Lovegrove.

The number of Candidates examined in this term was 106: of these, 103 passed, and 3 were postponed.

CALLS TO THE BAR.

Hilary Term, 1871.

LINCOLN'S INN.—Sidney James Owen, Esq., M.A., Oxford; Alexander William M'Dougall, Esq., B.A., Cambridge; James Lempriere Hammond, Esq., a Fellow of Trinity College, Cambridge, M.A.; Eaglesfield Bradshaw Archibald Lockhart Smith, Esq., a Fellow of Christ's College, Cambridge, M.A.; Christopher Henry Edmund Heath, B.A., Oxford; Percy Mitford, Esq.; Russell Donnithorpe Walker, Esq., B.A., Oxford; John Timms, Esq., B.A., Cambridge; William Rann Kennedy Esq., a Fellow of Pembroke College, Cambridge, B.A.; Arthur Johnston Mackey, Esq., B.A., Oxford; Wallwyn Poyer Burnett Shephard, Esq., B.A., Cambridge; Robert Wardrop, Esq., University of Edinburgh; Thomas Maitland Gibson, Esq., B.A., Oxford; Henry Ernest Hall, Esq., B.A., Cambridge; George Pemberton Leach, Esq., B.A., Oxford; Edward John Watson, Esq., B.A., Cambridge; William Wilbraham Ford, Esq., B.A., Oxford; Jamshedji Jivanji Gazdar, Esq., M.A., Bombay University; Hermusjee Pestonjee, Esq., B.A., Bombay University; Harold Carylton Gore Browne, Esq., B.A., Cambridge; Alexander Robertson, Esq., M.A., University of Edinburgh; and George Robert Elsmie, Esq., University of Aberdeen.

INNER TEMPLE.—Henry Herbert Stephen Croft, Esq., M.A., Cambridge; Cornelius Neale Dalton, Esq., M.A., Cambridge; Henry Wagner, Esq.,

M.A., Oxford; William John James, Esq., B.A., Cambridge; Francis Henry Blackburne Daniell, Esq., M.A., Cambridge; William Wightman Wood, Esq., B.A., Oxford; William Henry Walter Ballantine, Esq., LL.B., Cambridge; James Jardine, Esq., M.A., Cambridge; Arthur Edward Clarke, Esq., B.A., Cambridge; Charles Welsby, Esq., B.A., Cambridge; Henry Anchade Harben, Esq., B.A., London; John Henry Crawford, Esq., B.A., Oxford; Charles James Tarring, Esq., B.A., Cambridge; Isaac Richard Reece, Esq., B.A., Cambridge; Thomas James Sanderson, Esq., Cambridge; Percy Gye, Esq.; the Hon. Frederick George Lindley Wood, B.A., Cambridge; Edmund Kelly Bayley, Esq., LL.B., Cambridge; Henry Lyon Anderton, Esq., B.A., LL.B., Cambridge; Edward Morten, Esq., B.A., Cambridge; George Flood France, Esq., B.A., Oxford; and George Herbert Morrell, Esq., M.A., Oxford.

MIDDLE TEMPLE.—Hector Graham Browne, Esq.; James Henry Nelson, Esq., M.A., late Fellow of King's College, Cambridge; Henry Denny Warr, Esq., M.A., and Fellow of Trinity Hall, Cambridge; Frederick John Staples Browne, Esq.; Benjamin Law, Esq., M.A., Queen's College, Oxford; Walter Mytton Colvin, Esq., LL.B., Trinity Hall, Cambridge; Charles Metcalfe Dick, Esq.; Francis Smith, Esq.; George Laughton, Esq.; Richard Ingram Dansey, Esq., B.A., Queen's College, Oxford; James Cruikshank Roger, Esq.; William Augustus Bonnaud, Esq.; Edmund Albert Nuttall Royds, Esq.; George Charles Kilby, Esq.; Charles Coleman Dillon, Esq.; Jacob Thomas Geogegan, Esq., B.A., Trinity College, Dublin; and Edgar Hutchinson Little, Esq., M.A., Brasenose College, Oxford.

GRAY'S INN.—William Bowen Rowlands, M.A., Jesus College, Oxford, holder of a certificate of honour, first class, Michaelmas Term, 1870.

APPOINTMENTS.

Sir William Rose Mansfield has been raised to the Peerage as Lord Sandhurst.

The dignity of Knight has been conferred on Mr. Charles Robert Turner, late Senior Master of Her Majesty's Court of Queen's Bench at Westminster.

Mr. John Wickens has been appointed Vice-Chancellor in the place of Sir John Stuart, resigned; and Mr. George Little, Q.C., has been appointed Vice-Chancellor of the County Palatine of Lancaster, in the place of Mr. Wickens.

Mr. James Fleming, Q.C., has been appointed Chancellor for the County Palatine of Durham, in succession to the late Mr. Christopher Temple, Q.C.; and Mr. John Worledge, Judge of the County Court, Circuit No. 33, Chancellor of the Diocese of Norwich, in the room of the late Mr. Edward Howes, M.P.

Mr. John Gray, Q.C., has been appointed Solicitor to the Treasury in the room of the late Mr. John Greenwood, Q.C.

Mr. J. R. Kenyon, Q.C., has been elected Chairman of the Shropshire Magistrates in the room of the late Sir Baldwin Leighton, Bart.

Mr. John Osborne, Q.C., has been appointed County Court Judge of Circuit No. 5, in the place of Mr. Christopher Temple, Q.C., Professor Abdy, D.C.L., to the Judgeship of the County Courts, Circuit 38, in the place of Mr. William Gurdon, and Mr. D. R. Blaine to that of Courts No. 1, in the place of Mr. W. Blanchard.

Mr. W. Cope has been appointed Recorder of Bridgenorth, and Mr. T. Sirrell Pritchard, Recorder of Wenlock, in the room of the late Mr. U. Corbett Winder.

Mr. G. W. Hemming has been appointed Counsel in Equity to the Attorney-General in the place of Mr. Wickens.

The Right Hon. John Robert Mowbray, M.P., has been appointed a Church Estate Commissioner in the room of the late Mr. Edward Howes, M.P.

Mr. Montague Bernard, Professor of International Law at the University of Oxford, has been appointed a Member of the Commission to assemble at Washington to investigate the *Alabama* and other claims now pending between England and the United States.

Mr. Jacob Waley, Barrister-at-Law, has been appointed Conveyancing Counsel to the Court of Chancery in succession to the late Mr. Hayes.

Mr. H. S. P. Winterbotham, M.P., Barrister-at-Law, has been appointed Under Secretary of State for the Home Department.

Mr. Joseph Keech Aston, Barrister-at-Law, has been appointed Treasurer and Secretary to Queen Anne's Bounty, rendered vacant by the retirement of Mr. Christopher Hodgson.

Mr. T. S. Southgate, Solicitor, has been appointed Clerk and Superintendent Registrar of the Gravesend Board of Guardians; Mr. E. A. Hillier, Solicitor, Clerk to the Gravesend and Milton Improvement Commissioners; Mr. John Honchen, Solicitor, Clerk to the newly-formed Board of Navigation Commissioners of Thetford; Mr. Thomas Postlethwaite, Register of the Ulverstone County Court; Mr. G. M. Seabroke, Clerk to Rugby Bench of Magistrates, and Mr. J. Godfrey-Faussett, Registrar of the Court of Probate at Canterbury.

Mr. G. Edward Digby, Solicitor, of Maldon, has been appointed Town Clerk of that borough in the place of his father, resigned; Mr. H. Cipriani Potter, Town Clerk of Romsey, in the place of Mr. C. J. Tyler, resigned; and Mr. G. Christopher Roberts, Solicitor, Town Clerk of Kingston-upon-Hull, and Clerk to the Court of Venire in succession to the late Mr. Robert Wells.

Mr. Charles Bulmer, Solicitor, of Leeds, has been appointed by the Town Council, Clerk of the Peace for that borough, in the place of Mr. J. W. Hamilton Richardson, resigned; and Mr. William Stephens, Solicitor, Clerk of the Peace for the county of Radnor.

Mr. E. W. M. Hanse, Barrister-at-Law, has been appointed Clerk to the Liverpool School Board; Mr. Joseph Willis Swinburne, Town Clerk of Gateshead, Clerk to the Gateshead School Board; Mr. John James, Town Clerk of Wrexham, Solicitor, to the School Board there; Mr. Robert Edgar, Solicitor, Clerk to the Hartlepool School Board; Mr. Thomas Hustwick, Solicitor, Clerk to Soham District, Cambridgeshire; Mr. F. P. Morrell, Solicitor, Clerk to the Oxford Board; Mr. John Watson, Solicitor, Clerk to the Nottingham Board; and Mr. Studholme Cartmell, Solicitor, Clerk to the Carlisle Board.

IRELAND.—Mr. Stanislaus J. Lynch has been appointed Registrar of the Landed Estates Court, in the place of Mr. Carey, resigned.

The Right Hon. John George, one of the Justices of Her Majesty's Court of Queen's Bench, and the Hon. Stephen Woulfe Flanagan, one of the Judges of the Landed Estates Court, have been appointed Commissioners of the Board of Charitable Donations and Bequests in Ireland.

Mr. Patrick Carey has been appointed Chief Clerk of the Court of Common Pleas, in the room of Mr. Cornelius Davy, deceased.

JAMAICA.—Mr. James Gibson Starke, Advocate, has been appointed a Puisne Judge.

MAURITIUS.—Mr. A. Gib Ellis, has been appointed Substitute Procureur and Advocate-General.

TRINIDAD.—Mr. Henry Court has been appointed Puisne Judge for the Island.

Necrology.

January.

- 14th. SMITH, J. Sidney, Esq., Barrister-at-Law, aged 66.
- 21st. HUME, J. Burnley, Esq., Barrister-at-Law, aged 52.
- 24th. HARROD, Henry, Esq., F.S.A., Solicitor.
- 25th. LEWIS, C. Warner, Esq., Barrister-at-Law, aged 50.
- 27th. PHILLIPS, Augustus, Esq., Barrister-at-Law.
- 27th. COOPER, George, Esq., Solicitor, aged 83.
- 29th. PAITSON, William, Esq., Solicitor, aged 44.
- 29th. TANDY, Frederick, Esq., Solicitor, aged 30.
- 31st. STALMAN, Henry, Esq., Barrister-at-Law, aged 74.
- 31st. HAYES, William, Esq., Barrister-at-Law.

February.

- 1st. WILDE, E. Archer, Esq., Solicitor, aged 84.
- 6th. WELLS, Robert, Esq., Solicitor, aged 57.
- 6th. FLIGHT, E. Gill, Esq., Solicitor, aged 67.
- 7th. CORBETT-WINDER Uvedale, Esq., Barrister-at-Law, aged 78.
- 7th. TAYLOR, F. J., Esq., Solicitor.
- 10th. TAYLOR, G. Frederick, Esq., Solicitor, aged 80.
- 12th. POSTLETHWAITE, J. Pearson, Esq., Solicitor, aged 56.
- 12th. GREENWOOD, John, Esq., Q.C., aged 70.
- 12th. DE GEX, W. Francis, Esq., Solicitor.
- 14th. PITTS, James, Esq., Solicitor, aged 71.
- 15th. TOONE, Henry, Esq., Solicitor, aged 74.
- 18th. WILTON, J. Robert, Esq., Solicitor, aged 70.
- 20th. CHALK, Charles, Esq., Solicitor, aged 59.

- 20th. WOOLLS, Edward, Esq., Solicitor, aged 68.
- 21st. FOX, W. J., Esq., Solicitor, aged 60.
- 23rd. SOUTHGATE, Francis T., Esq., Solicitor, aged 52.
- 25th. HEMMING, C. Burt, Esq., Solicitor, aged 73.
- 28th. ALLISON, G. Thomas, Esq., Solicitor.

March.

- 6th. GERY, T. Lewis, Esq., Solicitor, aged 55.
- 6th. TOULMIN, S. Simpson, Esq., Barrister-at-Law, aged 68.
- 12th. HERBERT, E. Gilbert, Esq., Barrister-at-Law, aged 32.
- 12th. WHITTINGTON, Benjamin, Esq., Solicitor, aged 72.
- 15th. WEST, Francis G., Esq., Solicitor, aged 65.
- 20th. MANCLARKE, Thomas, Esq., Solicitor, aged 34.
- 21st. BURRUP, John, Esq., Solicitor, aged 78.
- 29th. GREGORY, J. Christopher, Esq., Solicitor, aged 61.
- 30th. SHARPE, J. Chaldecott, Esq., Solicitor, aged 76.

April.

- 1st. MILWARD, George, Esq., Barrister-at-Law, aged 64.
 - 5th. COOTE, Richard, Esq., Barrister-at-Law, aged 56.
 - 8th. BANBURY, Edmund, Esq., Barrister-at-Law, aged 54.
 - 9th. COLT, G. N., Esq., Barrister-at-Law, aged 47.
 - 13th. NORTON, B. Gustavus, Esq., late Puisne Judge of British Guiana.
 - 13th. WALUR, William, Esq., Solicitor.
 - 15th. DAVIDSON, Right Hon. J. Robert, Q.C., M.P., Judge Advocate General, aged 45.
 - 16th. MAKINSON, John, Esq., Solicitor, aged 79.
 - 18th. BASSETT, Joseph, Esq., Solicitor, aged 73.
 - 19th. SKINNER, Fitzowen, Esq., Barrister-at-Law.
 - 24th. BROOKES, William, Esq., Solicitor, aged 72.
 - 24th. SOWLER, R. Scarr, Esq., Q.C., aged 55.
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INTERNATIONAL CONGRESS

ON THE

PREVENTION AND REPRESSION OF CRIME,

INCLUDING

PENAL AND REFORMATORY TREATMENT.

The right treatment of Criminals by Society and by Government is a subject which for more than half a century has engaged the attention of philanthropists, thinkers, and legislators.

Most of the European nations, as well as the United States of America and the English Colonies, have manifested of late years a great desire to compare the experience which has been gained in various nations, with a view to elicit sound principles, and to adapt them to the establishment of the system of prison management and discipline best suited to the requirements of their several countries.

A proposal was sent forth about two years ago, from the United States, that an International Congress should be held in one of the great capitals, with a view to collect together all these experiences, to bring them under discussion, and to establish what might prove, henceforth, a centre of communication among all interested in the subject.

London was decided on as the most suitable place for the Congress, and 1872 appeared to be the earliest time at which it could be convened. A preparatory Congress was held at Cincinnati, in the United States, last year, with the most satisfactory results.

The task of arranging the preliminaries of the International Congress has been imposed on Dr. Wines, the Secretary of the National American Prison Association, of New York, who has entered into communication with persons of all nations, and with the accredited representatives of their Governments resident at Washington.

The Council of the National Association for the Promotion of Social Science are desirous of giving every aid in their power to make the proposed Congress a successful and useful meeting. At their last meeting it was resolved unanimously to co-operate with Dr. Wines in every practicable way in prosecuting the objects of his mission.

Prospectuses and information may be obtained, on application at the Office of the

NATIONAL ASSOCIATION

FOR THE

PROMOTION OF SOCIAL SCIENCE,

1, ADAM STREET, ADELPHI, W.C.

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THE
Law Magazine and Law Review :
OR
QUARTERLY JOURNAL OF JURISPRUDENCE.

No. LXII.

ART. I.—THE LAW OF FIXTURES, ITS HISTORICAL DEVELOPMENT AND PRESENT STATE. PART II. *By* ARCHIBALD BROWN, of the Middle Temple, Barrister-at-Law.

THERE remain to be illustrated two further applications of our rule, namely—(1.) That application of it which is finally determined by some regulative document in the nature of an agreement; and (2.) That application of it which finally turns upon some derivative relation or relations which have come to be established in one or both of the contending parties towards some third person or persons. But inasmuch as the illustration of these latter applications of the rule forms in reality the substantive continuation of the Law of Fixtures, which is the subject of our article, in proceeding with that illustration, we in fact resume the consideration of our subject in its main or leading branch.

Now it might *prima facie* be supposed that in accordance with that well-established principle of our law, whereby “*modus et conventio vincunt legem*,” a written document in the nature of an agreement between the persons, the parties to it, would in all cases be the *paramount* consideration for counsel and judges to regard in forming their opinions in respect of the fixtures comprised or apparently comprised

in it, or affected or apparently affected by it; and it has been customary for writers upon this branch of our law to make the existence or non-existence of such an agreement the principal criterion for the logical division of their subject. We may point out, for example, that in the two latest works upon the law of landlord and tenant, the work of Mr. Fawcett, and the joint work of Mr. Smith and Mr. Soden, this is the treatment which has been adopted. And yet if our historical deduction, as given in Part I., is correct, and more particularly, if Lord Kenyon was justified (as we think he was), in taking the somewhat nice distinction, which he did take, in the case of *Dean v. Allalley*, *supra*, then we, for our own parts, at least, should hesitate to accept with the same unguarded and unsuspecting readiness that others do, the fact of agreement or no-agreement as the paramount criterion in all cases whatsoever; although doubtless in the great majority of modern cases, and of cases presently arising, the factum or non-factum of an agreement is practically the primary, and, in many cases, the only consideration. We persist, however, in our opinion, as formerly expressed, that the true historical (and therefore also the only truly logical) importance of this criterion is that which we have assigned to it above, namely, an importance subordinate and secondary to the application of the two rules which respectively regard (1.) The amenability or non-amenability of the particular fixture to the old and rigorous law affecting the strictly agricultural class of fixtures; and (2.) The correspondence or non-correspondence of the particular fixture to the quality of the inheritance, whereby it becomes, or does not become, chemically united with it, and in a manner absorbed into and lost in it. With this explanation (which may possibly be liable to refutation) we proceed in the first place to set forth the cases into which an agreement has entered.

In the year 1807, in the case of *Naylor v. Collinge* (1 Taunt., 19), under a covenant by a trader-lessee to yield up in repair, at the expiration of his lease, "all erections and

buildings" already at the date of the lease erected and built, or thereafter to be erected and built, upon the premises demised, buildings *let into the ground*, although erected by the tenant *for the exclusive purposes of his trade*, were held in accordance with the old law relating to buildings incorporated with the inheritance, confirmed (or at least, recognised and accepted) as that law was by the terms of the covenant, to be included in the covenant, and to be irremovable by the tenant; and in like manner, and for the like reason, in the year 1818, in a case of *Penry v. Brown*, under a like covenant by a domestic-lessee, a *verandah let into the ground, although put up by the tenant for ornament merely*, was held to be irremovable by the tenant. It is, moreover, to be particularly noted that in the former of these two last mentioned cases, an exception from the terms of the covenant was allowed in favour of trade in respect of such of the buildings and erections as were made to rest on blocks or patens *without being let into the ground*, an allowance which was in strict accordance both with the letter, and with the spirit of the letter, of Lord Kenyon's decision in *Dean v. Allalley*, *supra*, and which seems, therefore, to corroborate, in no slight degree, our principle of subordinating the terms of the agreement to those grand old rules which we derived from our historical deduction. But to proceed,—in the year 1856, in the case of *Burt v. Haslett* (18 C.B., 163, and, on appeal, 893), under a covenant by a lessee (who was a linendraper) to yield up at the expiration of his lease the premises demised, together with "all . . . windows . . . and other things, . . . affixed or belonging thereto, . . . and together also with all . . . improvements . . . made upon the premises," a plate-glass front put in by the tenant in place of the old window, although not fastened otherwise than with *wedges*, was held to be included within the scope of the covenant, in consequence of the express words of the covenant, and in particular of the word *windows* occurring therein; and here again, it is of importance to observe that the spirit of Lord Kenyon's

decision in *Dean v. Allalley* was fully recognised, for the window, although intended by the linendraper for the purposes of his trade alone, was as much the exclusive subject of the old law of the strictly agricultural fixtures, as buildings let into and incorporated with the soil, being in fact an *outer* window, which, like an outer door, is strictly NECESSARY to complete the house, and as being so becomes *instantly* part and parcel of the inheritance, and not removable by the tenant even who has erected it at his own expense, so that notwithstanding all the linendraper's ingenuity, his glass front was in fact caught in our first sieve, irrespectively of his covenant, which only confirmed or recognised our principle. Again, in the case of *Mansfield v. Blackburne* (6. Bing. N.C., 426), decided in the year 1840, under a covenant by the trader-lessee of a salt-spring to leave the salt-works (which the same lessee had also agreed to erect) in good repair at the end of his term, it was held that the iron salt pans, as being parcel of the salt works, were included, and were in consequence thereof become, although in their own nature removable, practically irremovable by the tenant, Tindal, C. J., remarking in his judgment in this case with, however, (it seems to me) numerous inaccuracies as follows:—

“If this had been the ordinary case between landlord and tenant, as to the right of the latter to remove fixtures, or other things erected on the premises, at the end of the term, we should have entertained no doubt but that the salt-pans had been removable by the tenant, as well from the nature and description of their annexation to the freehold, as upon the doctrine laid down by Lord Mansfield in *Lawton v. Salmon*, that it would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt-works; he might very well have said, ‘I leave the estate no worse than I found it.’ That would be for the encouragement and convenience of trade, and the benefit of the estate,” (*sed quaere*).

“But the question before us does not turn upon any general rule of law (*sed quaere*), but upon the interpretation of a positive con-

tract into which the parties have entered with each other, and the point we have to determine is, whether under that contract it was the intention of both parties, that the salt-pans should be left at the determination of the term, or that the tenant should have the power to remove them."

Now, here also, the Chief Justice, although seeming to question our principle, unconsciously regulates his decision, and in fact he decided, in accordance with it. So, again, in the case of *R. v. Topping* (1 Maclel. & Y., 544), decided in 1825, and in the case of *Dumergue v. Rumsey* (2 H. & C., 777), decided in 1866, an express clause in an agreement being held to have defeated (in the one case accidentally, in the other case intentionally) the tenant's right of removal, the fixtures became in consequence thereof instantly and indissolubly united with the inheritance, so as not to be leviable under a *fi. fa.* issued against the lessee. Such is the predominant vivacity or efficacy of the two considerations which I have designated paramount, and such also the readiness with which agreements not opposing coincide with them in their operation, to the utter disregard of every equitable consideration to the contrary.

Before, however, it is possible to maintain the absolute and universal paramouncy of my principle over all private stipulations and agreements whatsoever, it is necessary to inquire and know whether any covenant or agreement which not only does not coincide with it, but which directly aims at superseding or displacing it, has been allowed to, in fact, supersede or displace it. Now, there is the case of *Sumner v. Bromilow* (34 L.J. (N.S.), Q.B., 130), decided so recently as the year 1865, in which in a state of circumstances otherwise resembling the case of *Mansfield v. Blackburne*, *supra*, it was held that the salt-pans in question were removable by the tenant who had put them in, and that they were so removable by reason of a difference in the words of the covenant—a difference apparently suggested to

the draftsman or conveyancer by the decision in *Mansfield v. Blackburne*, being the exception or reservation *in express terms* of the "salt-pans and other removable articles" out of the general scope or operation of the covenant. So that our cherished principle apparently succumbs, and the old law, it seems, may be displaced in the interests of trade, or, indeed, of any other interest, by the employment of apt words *expressly (and not in intention merely)* displacing or defeating it. The hallowed traditions of the past are indeed ever destined, in the natural course of jural development, to yield before the so-called imperative demands of modern life, and the Court of Queen's Bench, in particular, as at present constituted, has always shown more readiness than reluctance to break off from the past. Probably, however, it is better so, certainly it is more in keeping with the strong reality of modern regards to openly and directly recognise, instead of fictitiously ignoring while in fact accepting, changes of the sort referred to. And at all events we, as mere writers stating what the law actually is, are compelled by this decision to recognise the maxim, *Cuique juri pro se introducto renuntiare licet*, in its free operation in respect of all fixtures, as well those of the ancient as those of the modern class. And yet, even while compelled to admit thus much, who that has followed the course of decision downwards as presented in this article, or in the prior portion of it, would hesitate for one instant to agree with me in my view of the desirability and indeed necessity of attributing, if not a paramouncy to the first and second portions of my general rule, at least of attributing to them a paramount importance as collateral considerations, as exercising an all-powerful influence when not directly, expressly, and laboriously excluded? Our general rule remains therefore, if not altogether unassailable, practically unassailed.

We shall give but one further illustration of the extremely vigorous, and indeed the instantaneous, operation of those first and second portions of our rule, even in spite of cove-

nants and agreements, which might seem to expressly and directly exclude their operation. The case shall be that of *Foley v. Addenbrooke* (13 Mee. & W., 174) decided in the year 1844. The covenant in that case was to repair, and yield up in repair "the furnaces, fire-engine, iron works, dwelling-houses, and all other erections, buildings, improvements, and alterations, *EXCEPT the iron work castings, railways, wimseys, gins, machines, and the movable implements and materials used in or about the said furnaces, fire-engine, iron works, and premises;*" and it was held by the Court of Exchequer that under this covenant the defendants (who were the lessees) had a right to remove "whatever was in the nature of a machine or part of a machine, but not what was in the nature of building, or of *support of buildings although made of iron* (and that in such removal they might disturb such brickwork as was necessary, &c.)" Now what was the reason why *the supports of buildings made of iron* were irremovable, although they were in fact *iron castings*, and as such therefore within the *exception* of the covenant? Why, it was simply the operation meanwhile of the first and second portions of our rule. The iron supports had, in virtue of their application, ceased to be *iron castings* merely, and had become meanwhile indissolubly incorporated with the buildings of which they were the necessary complements.

It is doubtless true that the great majority of modern fixtures pass readily and at once through both our first and our second sieves, being neither of the strictly agricultural sort, nor yet of a character to chemically unite with the inheritance; and hence has probably arisen the prevalent confusion of thought, to which we have already more than once alluded, of supposing the agreement or covenant to be solely and entirely regulative of the removability or irremovability of the particular fixtures. There are numerous cases of this modern sort; we shall only quote one, or at the most two typical instances of them. One is that of *Elliott v. Bishop* (10 Exch., 496, and on appeal, 11 Exch., 113), where, under

a covenant by a building tenant to yield up at the expiration of his term the premises demised, together with all "locks, keys, bars, bolts, marble and other chimney pieces, foot-paces, slabs, and other fixtures and articles in the nature of fixtures" put up during the term, it was held that neither the so-called tenant's fixtures nor the so-called trade fixtures usual in the tenancy and trade of the sub-lessee (who was a licensed victualler) were included in the covenant, the interpretation of which turned (in the particular circumstances of the case) upon the mere general rules of the interpretation of written documents, according to which (as Mr. Bovill pointed out in his argument) *verba generalia* following upon enumerated particulars are to be construed as *generalia ejusdem generis*, and therewith the case was at an end. So, again, in the case of *Duke of Beaufort v. Bates* (31 L.J., N.S., Cha. 487), it was a mere question of interpretation, the matter in dispute being whether certain "tram-plates" fastened some to iron-sleepers and some to wooden sleepers, resting upon but not dug into the earth floor of a mine, were or were not included in the phrase "ways and roads" contained in a covenant in the lease. And yet even in these cases of apparent simplicity, it would be hazardous (and perhaps untrue) to state that the first and second portions of our principle received no regard; only they were evidently excluded from effective operation.

It remains to illustrate our rule of the Law of Fixtures in its application to those *derivative* relations subsisting in the two contending parties to which we have hitherto only alluded; this will complete our present article, from which (as the reader may have observed) we have carefully excluded the law of *ecclesiastical* fixtures, as being of too peculiar and unfamiliar a character to be treated promiscuously with the other classes of fixtures in this general review of the law.

Now the *derivative* relations in question (with the *derivative* rights corresponding to them), are of many sorts, but are chiefly the following:—

- (1.) Mortgagee of lessor, or of lessee,
- (2.) Assignee (or trustee) in bankruptcy of lessor, or of lessee,
- (3.) Execution-creditor of lessor, or of lessee,
- (4.) Vendee of lessor, or of lessee, in their various permutations and combinations. Also
- (5.) Executor and heir of lessor, or of lessee,
- (6.) Tenant for life and remainderman or reversioner, and
- (7.) Outgoing and incoming tenant.

From this enumeration it will appear that we have innovated upon the customary classifications; but we have done so with much carefulness, and from the *bonâ fide* conviction that the innovations will operate as improvements, introducing unity of conception, and abolishing, or at least reducing into their proper relations of subordination, the arbitrary distinctions and arbitrary co-ordinations of previous writers.

Now in respect of all these subordinate matters, there is much less intricacy of matter, and also much less variety of doctrine, than the multitude of the decisions which have been given upon them would naturally make believe. There is indeed a wonderful simplicity or similarity in all of them. And for the purpose of presenting them to the reader in such a way as to make this their character for simplicity and similarity apparent to him, only one small lemma is required in addition to the explanations already given in this article, and this lemma is also itself of so simple a character as to be rather a corollary from those explanations than a substantive assumption added to them. It is this—

It has already appeared that the strictly agricultural fixtures of the old law instantaneously coalesced with the land or realty to which they were annexed; they were therefore, one would *primâ facie* imagine, an interest in land. It is, however, commonly said that fixtures are NOT an interest in land within the meaning of the Statute of Frauds, so as to require a note or memorandum in writing under the 4th

section of that Statute, and the case of *Hallen v. Runder* (1 Cr. M. & R., 266), is commonly quoted in support of this opinion. But when this case is critically examined, it is seen that the equities involved in it were so strong and many, that they biassed the judges in their decision of it, and induced them to take advantage of the particular—the very particular—circumstances of the case, in order to ground upon them in the interest of particular justice a distinction which the writers submit was not borne out by general law, holding (as they held), contrary to the very clear and powerful, and withal the learned argument of Mr. Kelly, that as *fixtures* denoted the “tenant’s right to remove,” a contract to forego that right was not an interest in land within the 4th section of the Statute of Frauds. Now this decision was an acknowledged evasion of the law, and does not therefore, in our opinion, warrant the generality of the conclusion that is frequently, indeed commonly, drawn from it; for that conclusion affects to extend to fixtures in themselves, what was only asserted in *Hallen v. Runder* at the most of “a contract to forego the removal of them.” If this be so, the quality of *fixtures* in themselves, whether they are real estate or personal estate, remains in truth an open question, and the determination of it is the *lemma* which we must premise.

Now, the principles of the law of fixtures, as developed in this article, would draw a distinction of the following kind—

(1.) That the strictly Agricultural Fixtures of the old law were and are beyond all question an interest in land, and that they are also permanently and indefeasibly so.

(2.) That the Modern Agricultural, the Trade Proper, and the Domestic or Ornamental classes of Fixtures are:—

(a.) Some of them, interests in land, defeasible by the act of the tenant who has the right to remove them; while again—

(b.) Others of them are chattels pure and simple, and are not even defeasible interests in land.

Further, all the passages which we have cited from the Year Books, and to which we may for present purposes generally refer the reader back, conspire to show that fixtures as well those of the modern as those of the old law, were part and parcel of the frank-tenement or freehold, so long as they continued annexed to it; and that such of them as were annexed by the landlord (that is to say, by the owner of the freehold) formed indefeasible parts of the freehold, whereas such of them as were put up by the tenant (the strictly agricultural fixtures being always excepted) were defeasible parts of the freehold, but became indefeasible parts of it immediately the time for their removal by the tenant had expired, and he had failed to remove them. Moreover, the views which are expressed in the Year Books are fully borne out by the subsequent decisions, both early and recent. Thus in the case of *Lee v. Risdon* (7 Taunt., 188), decided in 1816, Gibbs (C. J.) spoke as follows:—

“Many of these articles (household fixtures and furniture), though originally goods and chattels, yet when affixed by a tenant to the freehold, cease to be goods and chattels by becoming part of the freehold; and though it is in his power to reduce them to the state of goods and chattels again by severing them during his term, yet until they are severed, they are a part of the freehold, as wainscots screwed to the wall, trees in a nursery ground, which when severed are chattels, but standing are a part of the freehold, certain grates, and the like. And unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it, and it never, I believe, was heard of, that trover could be afterwards brought.”

Again, in the case of *Lyde v. Russell* (1 B. & Ad., 394), decided in 1830, Lord Tenterden held that bells hung by a yearly tenant at the sole expense of the tenant himself, but allowed by him to remain fixed to the freehold after the expiration of his term, became the property of the landlord, and did not even when afterwards severed by the landlord resume the character of chattels so as that the tenant might

bring trover for them. And in the very recent case of *Pugh v. Arton* (8 L.R. Eq., 626), decided by Vice-Chancellor Malins in 1869, it was held that tenant's fixtures cannot be removed after the expiration of the term, and that for that matter it makes no difference whether the lease expires by re-entry on forfeiture, or by effluxion of time.

Now what is there against these opinions? Nothing, but what admits of a ready explanation. First, there is the case of *R. v. Londonthorpe* (6 T.R., 377) decided in 1795, where it was held, that a *post windmill* put up by a tenant, but by *express* agreement between the tenant and his landlord made removable at any time by the tenant, and actually let by the tenant to a third party, was not such a tenement or was not a tenement in such occupation as entitled the tenant who had erected it to a settlement within the meaning of the Poor Laws. Again, there is the case of *R. v. Otley* (1 B. & Ad., 161) decided in 1830, where it was held that a *windmill* rented along with other property (the latter property being of an admittedly real character) was not a tenement within the meaning of the Poor Laws for the purpose of helping the pauper to obtaining a settlement under these laws, being a mere superstructure of wood resting by its own weight upon a brick foundation, no part of its machinery touching either the ground or the foundation. Now, of both these last mentioned cases, the most obvious remark to make is this, that their exceptional circumstances were the occasion of the question arising at all, and that under ordinary circumstances therefore, windmills and such like fixtures and *à fortiori* fixtures that were more manifestly so, would have been considered, and were in fact customarily considered, tenements or real estate for all purposes, and therefore also for the purpose of conferring a settlement within the meaning of the Poor Laws. And accordingly we find that in the case of *R. v. St. Dunstan* (4 B. & C., 6, 86) decided in 1825, it was held that certain fixtures demised to a tenant along with his tenement were held to be parcel of the demise or of the

tenement for the purpose of entitling the tenant to such a settlement. And we also find that in the case of *R. v. Guest* (7 A. & E., 951), decided in 1838, it was held that machinery fixed in coal and iron mines by the persons, the lessees of the mines, were for the purposes of a poor rate which was being levied upon the mines to be regarded as forming part of the mines, so as to increase the assessable value of the freehold; but Lord Denman (C.J.), in holding to the effect stated, was careful to add that the question of the essential or abstract quality of the fixtures (whether real or personal estate) was not raised by the case. So, then, it appears that fixtures so far from being clearly not interests in land are in much more danger of being interests in land for all purposes whatsoever, and of being therefore also within the meaning of the Statute of Frauds.

It is necessary, however, to bear in mind the distinction which in a previous part of this article we pointed out as having been recognised in modern times, between the so-called fixtures that are either actually or constructively fixed for at least the time being to the freehold, and those so-called fixtures, which, whether of the Modern Agricultural, or of the Trade Proper, or of the Domestic or Ornamental Class are, and from first to last remain (rightly or abusively) of a purely personal or chattel nature. We have already had examples of this so-called chattel-fixture; we have a further example of such a fixture in the case of *Davis v. Jones* (2 B. & A., 165) decided in 1818, where it was held that certain *jibs*, parts of a machine which had been added to the machine by the tenant, a trader-lessee, during his term, and which were capable of being removed again from the machine without damage either to themselves or to it, were goods and chattels for which the outgoing or rather the *outgone* tenant might maintain trover for their non-delivery by the incoming or rather the *income* tenant upon demand made. Abbott (C.J.), in delivering judgment in the case, adopted the following alternative mode of speech, "If these jibs are to be considered as personal chattels

. . . On the other hand, if the jibs are to be considered as annexed to and parcel of the freehold, . . . " a dubiety in his lordship's mind which he ultimately settled by decreeing the jibs to be personal chattels. But the dubiety itself is important to note.

The result, therefore, of all the cases that have been adduced both *pro* and *contra*, goes to corroborate if not to establish the distinctions to which the principles stated hereinbefore would naturally lead. They are, moreover, distinctions which are indispensable to explain, and (let us add) which of themselves alone are sufficient to explain, the whole course of the subsequent decisions which have been made or had in the matter of those *derivative* rights and *derivative* relations to which we before referred; and surely this, their sufficiency, and this, their indispensability, go far to prove their truth. This lemma having been premised, we proceed to a consideration of the cases in detail.

We shall take these derivative relations in the order in which they were stated on a previous page.

Firstly, then, the mortgagee's derivative rights, with which however, are frequently mixed up those of the assignee (or trustee) in bankruptcy, and sometimes even those of the execution-creditor and of the vendee.

In the case of *ex parte Quincey* (1 Atk., 477) decided in 1750, where A was mortgagee of the reversion in a brew-house, subject to a lease for years granted by the freeholder his mortgagor to B, and where B had purchased the utensils of the brewhouse from his lessor, and had afterwards, and also after the mortgage to A, sold and assigned both the utensils and the lease to C, and when C thereupon or afterwards mortgaged both lease and utensils to D (who was in fact the original freeholder the mortgagor to A), and when D afterwards became bankrupt, it was not indeed held (because no decision was in fact arrived at), but Lord Hardwicke's strong opinion was, that the utensils were not included in the first mortgage, namely, that to A, and that

the assignees of D were therefore entitled to them, at least as against A. But of this case our data are scanty, and the circumstances are complex; it may be, therefore, that the particular utensils which were in dispute were of a purely chattel character, although indeed it may also be that they were fixtures of that sort which are a defeasible interest in land, in which latter case the tendency of Lord Hardwicke's opinion would (as we shall see) be contrary to the declared tendency of subsequent and more especially of the more recent decisions, if at least B's separate purchase of the utensils may be ignored.

Again, in the case of *Steward v. Lombe* (1 Brod. & B., 506), decided in 1820, where A the freeholder mortgaged his land to B for 1000 years, and also in express terms "bargained, sold, and set over" to B a certain windmill erected upon the land but found by a jury not to have been a fixture in the sense of being either a defeasible or an indefeasible interest in the land, and where A the mortgagor continued in possession after the mortgage, and C a judgment creditor of his, issued an execution against him, it was held that C could not take the windmill upon his *fi. fa.*; Dallas (C.J.), distinguishing under the circumstances which have been described, the rights of an execution-creditor from those of an assignee in bankruptcy, a distinction which differentiated that case from the case of *Horn v. Baker* (9 East, 215), decided in 1808, where under circumstances otherwise resembling those in *Steward v. Lombe supra*, the assignees in bankruptcy were held to have a preferable title to that of an annuitant-mortgagee of the bankrupts; although, indeed in the case of *Horn v. Baker supra*, a further distinction was taken, namely, that while the *vats*, &c., which were not fixed to the freehold, passed (as we have said) to the assignees under the bankruptcy, yet the *stills* which were fixed to the freehold did not pass to them under the words of the Statute, "goods and chattels in the apparent ownership or possession of the bankrupt at the date of his bankruptcy," but that all such *stills* had passed as part and parcel of the land or brewhouse to the annuitant-mortgagee

under her mortgage deed; and this distinction, as we shall see, has been carefully and invariably observed in all the subsequent decisions admitting of it. *Horn v. Baker* is indeed by Mr. Smith in his selection of leading cases, made the leading case upon the subject of this distinction; and it formed the almost sole ground of decision in the case of *Clark v. Crownshaw* (3 B. & Ad. 804), decided in the year 1832, where the like distinction arose.

Again, in the case of *Buchland v. Butterfield* (2 Brod. & B. 54), where A was lessee for years of a piece of ground and dwelling-house, and as such erected a conservatory, which was attached to, and (as was determined in the case) indefeasibly incorporated with, the dwelling-house, so as not even to be removable by the tenant himself who had erected it, and when A afterwards became bankrupt, and his assignees in bankruptcy claimed to remove the conservatory, it was held by Dallas (C.J.), that the assignees could not remove it as against the lessor the reversioner, and that too even although the bankrupt was himself entitled next in remainder after his lessor to the freehold and inheritance in the premises.

Again, in the case of *ex parte Barclay* (5 De G.M. & G., 411), decided in the year 1855, where A (who was by trade a publican), was lessee of a public house, and of other houses, and deposited by way of equitable mortgage his lease with B, giving at the same time the usual memorandum of deposit, and then afterwards became bankrupt while in possession both of the public house and of the other houses, and also of the trade and tenant's fixtures belonging to them (being the fixtures usual in the trade of a publican), it was held that B as such equitable mortgagee as aforesaid, was entitled to all the said fixtures (both the trade and the tenant's ones) as against the claim of A's assignees in bankruptcy, the fixtures not being (nor any of them being) in the order and disposition of the bankrupt within the meaning of the 125th Section of the Bankrupt Law Consolidation Act, 1845.

Again, in the case of *Mather v. Fraser* (2 Kay & J., 536), decided in the month of February, 1856, where A and B

(who were copper-roller manufacturers) were the owners in fee and tenants in common of certain land and of the mills erected thereon, and mortgaged the same to C, and afterwards became bankrupt, it was held by Wood (V.C.), that the mortgage of the land and premises carried with it all the articles let into the soil or fixed to the freehold, whether by screws, solder, or any other permanent means, and that for that matter it made no difference that the purposes to which the land in question was applied by the bankrupts was trade or manufacture and not agriculture; and moreover, that as these fixtures passed as part of the freehold, no registration of them under the Bills of Sale Act (17 & 18 Vic., c. 36), was requisite for the purpose of conferring a complete title to them upon the mortgagees. The assignees in bankruptcy of the mortgagors had therefore no claim whatever as against the mortgagees to any of the fixtures above enumerated, but articles standing by their own weight alone were not to be considered fixtures for the purpose of conferring such a prior right upon the mortgagee, in the absence at least of a properly registered Bill of Sale specially applicable to themselves.

Again, in the case of *Waterfall v. Penistone* (6 Q.B., 876), decided in the month of July, 1856, where A (who was a paper-maker) was the owner in fee of a piece of land and of the mill erected upon it, and mortgaged the same with the machinery to B, and afterwards mortgaged the same with the machinery to C, and afterwards by Bill of Sale "bargained, sold, assigned and set over" by way of mortgage to the said C the machinery erected since the date of the former mortgage to him, and in the same deed also covenanted that the mill and machinery comprised in the said former mortgage to C should be charged in addition with the money advanced upon the said second mortgage to him, and where A afterwards became bankrupt, C not having registered his said second mortgage as a Bill of Sale within the prescribed period of twenty-one days from the

date thereof, it was held that the assignees in bankruptcy of A were entitled to the machinery comprised in the said Bill of Sale, as fixtures of a chattel-nature and which had been treated as such by the parties to the third of the above-mentioned three mortgages, such third mortgage being *primarily* and characteristically or essentially a Bill of Sale, and not a freehold conveyance, notwithstanding the covenant also contained in it.

Again, in the case of *Walmsley v. Milne* (7 C.B., N.S., 115), decided in the year 1859, where A (who was a brewer, inn-keeper, and bath proprietor) was owner in fee of a piece of land, and mortgaged it while bare of all erections to B, and afterwards built erections of various sorts upon it, and then B after those erections transferred his mortgage to C, and then A became bankrupt, it was held that the assignees in bankruptcy of A had no claim as against C, the transferee of the mortgage of the land to the said erections, or to any of them, although these erections were put up for the exclusive purposes of the mortgagor's aforesaid trades, being a steam-engine, and boiler, a hay-cutter, a malt-mill or corn-crusher, and a pair of grinding-stones, and although they were also (or at least some of them were) capable of being removed without injury either to themselves or to the land; and the mortgage deed as it was not in any sense a Bill of Sale, so it required no registration to complete its efficacy, nor was its efficacy affected by the mortgagor's continuing in possession of the land, and of all the said fixtures and things up to the date of his bankruptcy.

Again, in the case of *Cullwick v. Swindell* (3 L.R., Eq., 249), decided in the month of December, 1866, where A was owner in fee of a certain dwelling-house, and also of a certain warehouse, and mortgaged the same to B, and then entered into partnership with C, and then A and C, together as such partners in their trade (which was that of iron-merchants), put up certain trade fixtures upon the premises, and afterwards executed a deed under the Bankruptcy Act, 1861, whereby

they conveyed all their property to D, for the benefit of their joint and separate creditors, it was held (and chiefly upon the principle established in a case of *ex parte Cotton*, 2 M.D., & D., 725), that B as such mortgagee as aforesaid was entitled to all the said trade fixtures as against D, notwithstanding their erection subsequently to the date of his mortgage, and in part by a person who was not a party to the mortgage deed.

Again, in the case of *Boyd v. Shorrocks* (5 L.R., Eq., 72), decided in 1867, where A and B (who were partners in the cotton-manufacturing trade) were lessees for years of a mill and of the machinery demised with it, and also of an adjoining piece of bare land, and erected further machinery and fixtures upon the piece of bare land, and then mortgaged to C the said mill and the machinery demised therewith and "all other machinery, whether fixed or movable then standing and being, or which at any time thereafter during the continuance of the security might be in and about such last mentioned mill and premises," and then afterwards became bankrupt, the mortgage deed not having been registered as a bill of sale, and A and B having continued in possession up to the date of their bankruptcy, it was held that C was entitled as against the assignees in bankruptcy of A and B to all the machinery with the fixtures) in and about the mill and premises as well that part of it which was subsequently added by A and B themselves as that part of it which was included in the original demise, and this notwithstanding that the machinery was put into the floors of the mill in such manner as to admit of its easy removal in an entire state without damage to the freehold of the mill.

Again, in the case of *Climie v. Wood* (3 L.R., Exch., 257, and on appeal 4 L.R., Exch., 328), decided in 1868-9, where A was owner in fee of two pieces of land, and mortgaged one of them (hereinafter called Piece No. 1) to B, and afterwards erected an engine-house upon the two pieces of land

putting an engine and boiler into it, and afterwards mortgaged the other piece of land (hereinafter called Piece No. 2) to C, and then executed a Deed of Inspectorship, and afterwards B (under a power contained in his mortgage deed) sold Piece No. 1 to D, it was held that the mortgagees of the two pieces of land and the persons claiming under them by sale or transfer were entitled to the engine and boiler put into the engine-house in preference to the trustees of the Inspectorship Deed, or persons claiming under them by purchase; Kelly (C.B.), who delivered the judgment of the court, saying towards the conclusion of his judgment as follows:—

“The result is that the old maxim of ‘*Quicquid plantatur solo, solo cedit*,’ applies in all its integrity to the relation of mortgagor and mortgagee, and that trade fixtures constitute no exception. It follows from this, that the findings of the jury, that the steam engine and boiler were fixed by the mortgagor *for their better use, and not to improve the inheritance, and that they could be removed without any appreciable damage to the freehold*, became immaterial, for the right of the mortgagee attaching by reason of the annexation to the land, the intention of the mortgagor in respect of them cannot prevail against the legal effect of the deed.”

Again, in the case of *ex parte Astbury, ex parte Lloyd's Banking Company, In Re Richards*, (4 L.R., Ch. App., 630), decided in July, 1869, where A (who was an iron manufacturer), was lessee for years of certain rolling mills, and made an equitable mortgage of them by deposit to B, and afterwards became bankrupt, it was held upon a special case stated between the mortgagee B, and the assignees in bankruptcy of A, that (besides the fixed machinery with respect to which no question seems to have arisen) of certain duplicate iron rolls of various sizes made to be fitted into the rolling machines, such of them as had been actually fitted into the rolling machines went to B the mortgagee along with the fixed machinery, while all such as had not yet been used in that way went to the assignees in bankruptcy of A;

and it was also then held, that certain straightening plates were fixtures and passed as such to the mortgagee, but that certain weighing machines were not fixtures, and belonged to the assignees in bankruptcy; Giffard (L.J.), in his judgment, stating as follows:—

“I think that if a man mortgages a machine, and afterwards, the machine itself being perfect, and fitted with rolls and everything else connected with it, other rolls are sent for to be used with the machine, but those rolls cannot be used unless and until they are fitted to the machine, it would be going a long way to say that the mortgagor shall be compelled to fit those rolls to the machine, and should be precluded from saying that they do not form a part of the machine.”

Again, in the case of *Longbottom v. Berry* (39 L.J., N.S., Q.B., 37), decided in December, 1869, where A (who was a woollen cloth manufacturer), was the owner and occupier of a piece of land with the building then erected upon it, and mortgaged the same by equitable deposit to B, and then built a mill upon the land, and fitted up the mill with steam engines and with the other machinery which was necessary for his trade, and then by Bill of Sale assigned to C “all the machinery, fixtures, implements, utensils, effects, and things,” mentioned in a schedule, and including in fact, all the machinery and articles in the mill, and then afterwards executed a legal mortgage to B the said equitable mortgagee, it was held that all the machines which were fixed in a quasi-permanent manner to the floor, roof, or side-walls, passed to B under his mortgage, but that those which were merely movable articles passed to C under his bill of sale.

Lastly, in the case of *Tebb v. Hodge* (39 L.J., N.S., C.P., 56), decided in November, 1869, where under circumstances of some complexity, a question having arisen between A who alleged himself to be an equitable mortgagee of B on the one hand and the assignees of B on the other as to the right to certain fittings put up by B, it was held that A

was in fact the equitable mortgagee he alleged, and the further decision of the question was left to follow as of course.

Such having been the general course of the decisions in cases primarily affecting mortgagees, and these decisions having also sufficiently illustrated the law as it affects assignees in bankruptcy, and even vendees, and having also partially illustrated the law as it affects execution-creditors, it remains to adduce only one or two more cases affecting execution-creditors before proceeding to the three other divisions (which are as yet untouched) of executor and heir, tenant for life and remainderman, outgoing and incoming tenant.

In *Poole's Case* already cited, a case decided by Holt (C.J.) in the year 1704, it was held that of certain trade fixtures set up by A who was lessee for years of a house in Holborn, such of them as were removable by A, were also seizable in execution by the sheriff upon a *fi. fa.*; but this holding was apparently not to extend to a *pavement*, &c., put into the ground by A, and not removable by him during his tenancy or afterwards.

Again, in the case of *Winn v. Ingleby* (5 B. & A., 625), decided in 1822, a distinction was taken in respect of the estate of the execution-debtor in the premises to which the alleged fixtures were attached; and it was held that the sheriff had no right under a *fi. fa.* to seize such fixtures where the house in which they were situated was the freehold of the execution-debtor. It is evident, however, that this distinction has now ceased to be of any practical importance since the Statute 1 & 2 Vict., c. 110, has extended the sphere of the law of execution.

Lastly, in the case of *Minshull v. Lloyd* (2 Mee. & Wel., 450), decided in 1837, where A (who was a worker of coal mines) was lessee for years of a colliery subject to a proviso for re-entry on insolvency, and erected certain steam engines, &c., &c., affixed in the usual manner to the soil, and afterwards assigned the colliery with the engines, &c., to trustees

for an annuitant, with a power of sale upon default, and A's lessor afterwards re-entered, the trustees not having then as yet exercised their power of sale, and the sheriff afterwards and before the annuity-trustees had exercised their power of sale, seised the engines and other articles in the colliery under a *fi. fa.* at the suit of an execution-creditor of A, it was held that the annuity-trustees could not recover the steam engines in trover against the sheriff, although the deed of assignment to them was not avoided by their omission to take possession and exercise their power of sale upon A's default in payment of the annuity.

Passing now to the cases which illustrate the law of fixtures as it affects the executor or executors and the heir or heirs of a deceased person, whether lessee or owner in fee of land, it is evident that the heir and the executor equally claim as *volunteers*, and they have therefore neither of them any equity over the other. As between themselves, therefore, the law is plain, that according as the *res principalis* or land goes to the one or to the other of them, so does the *res accessoria* or fixture go to the one or to the other. This explains how it was that in the passage quoted from the Office of Executors on a previous page, the fixtures although part of the house went to the executor; for there the house was leasehold. But the exceptional character of the passage referred to only proves and corroborates the general rule (as it is to be extracted from the cases), namely, that where the deceased is the owner in fee, there the fixtures which are such (being as they must be *indefeasible* parts of the inheritance) go to the heir and not to the executor, and only those things which are not fixtures in any proper sense, either actual or constructive, but which are and continue mere personal chattels, go to the executor and not to the heir.

This rule, it is true, appears in certain cases to have been departed from, or even violated; and the case of *Squire v. Mayer* (Freem., 249), decided in 1701 is an instance in point. It was there held that a furnace though fixed to the free-

hold, and purchased with the house, and also hangings nailed to the walls should go to the executor, and not to the heir—a determination stated to have been contrary to *Herlakenden's Case*, 4 Co., meaning to the case of *Warner v. Fleetwood* already quoted. But of this case two possible explanations may be given; either (1.) That the house in which the fixtures were situated was in reality *leasehold* so far as regarded the particular ancestor under whom the heir and the executor were severally claiming, although it is indeed described generally as freehold in the report of the case; or, (2.) That the fixtures in question in the case were of a peculiarly expensive and *unnecessary* sort, and had exhausted the personal estate in an excessive degree, so as that there was a strong equity of creditors calling for a mitigation of the rule; and this latter explanation is perhaps the more likely one of the two. Indeed, the rule of the law of fixtures as between heir and executor, as before expressed, must be taken to be subject to this partial mitigation, a mitigation moreover which may be thought to be peculiarly in keeping with the spirit of modern times, for there may now be as much waste of personal as there was formerly of real estate. Possibly, however, neither of the two explanations which we have suggested removes the discrepancy; and if so, then the discrepancy must remain, but the practical effect of the decision may be regarded as *nil*, so far as it would discredit the general rule before expressed.

The case of *Cave v. Cave* (3 Vern., 508), decided in 1705, is an authority in support of that rule; for it was there held that pictures and glasses put up instead of wainscot or where wainscot could otherwise have been put, should go to the heir and not to the executor. There is, however, a case of *Harvey v. Harvey* (2 Str., 1141), decided in 1741, in which it was held (in apparent contradiction to *Cave v. Cave*), that hangings, tapestry, and iron backs to chimneys should go to the executors and not to the heir; it may, however, be remarked of this case, that we know neither whether

the principal building was leasehold, nor in what manner the fixtures in question were put up, or whether they were not in fact duplicates not yet put in use, or old used-up articles which had ceased to be in use, any one of which circumstances would sufficiently account for the apparent contrariety.

In this conflict of the early authorities, we gladly resort to the more modern decisions, and in particular to the typical case of *Fisher v. Dixon*, a decision which is entirely in favour of the heir as against the executor to the extent of our general principle, that one of the two conflicting parties who takes the house, should also take such of the fittings or furnishings of the house as are necessary to complete the conception of it as a properly habitable abode. This decision has, moreover, been so frequently followed, that it may stand alone and supersede the necessity of a detailed statement of or reference to the other modern decisions.

Passing next to the cases which affect the relation between tenant for life and remainderman or reversioner; here it is evident that the heir shall have nothing as against the remainderman or reversioner, for that the land in virtue of which the heir's claim (if he had any claim) would arise has passed from him to the next person in the succession, and this latter person becomes substituted for him, just as a devisee or other successor might have been. And this substitution having been once effected, do not the persons, the respective claimants, namely, the remainderman or reversioner and the executor of the deceased tenant for life or in tail, appear before us as volunteers equally as the heir and the executor did on a former occasion? The mitigation which was allowed in favour of the executor on that occasion would also be allowed in his favour on this occasion, yet with perhaps less readiness of indulgence; for in this latter case, the executor's testator, not having been himself the full or sole owner of the land, or indeed the owner of it at all, but holding rather in virtue of the ownership of the person who created the entail or settle-

ment, would be obnoxious to the rule which we have already quoted from the "Institutes of Justinian," that he who builds upon another man's ground, knowing that it is another man's, must be taken to build for the good of the land, and not of himself. Now these principles, so far as they relate to buildings and the necessary competitions of buildings, are entirely borne out by the very carefully considered decision which was pronounced by Lord Romilly in the case of *D'Eyncourt v. Gregory*, to which we have so often referred, and to which we can here do nothing more than refer again.

The case of *Dudley v. Warde* (Amb. 113), decided so early as 1751, is an illustration of the MITIGATION in favour of the executor to which we have alluded; and just as *D'Eyncourt v. Gregory* furnishes us with the principle of the general rule, so *Dudley v. Warde* may be said to furnish the principle of that mitigation, in other words of the limitation of the rule, for it was held in the latter of these two cases, and clearly upon the old and now familiar principle of favouring trade, that a furnace erected in a colliery by a tenant for life (or in tail), went on the death of such tenant to his executor, and not to the remainderman. Now, it is clear that this decision was necessary for the purposes of encouraging trade generally, by the assurance which it gave to tenants for life under similar circumstances of their personal estate being re-couped after their death, the extraordinary disbursements which it should have been put unto during their life by reason of the imperative necessities of trade; nor is it at all in conflict with the case of *D'Eyncourt v. Gregory* above referred to; indeed the principle of the reconciliation of the two cases is afforded by the case of *Dudley v. Warde* itself in the distinction which was there taken between the particular fire-engine which has been mentioned, and two other like engines mentioned in the case, and therein stated to have been left to go to the remainderman rather than to the executor,—the latter two

engines having been put up and left by a tenant-in-tail, whose estate had preceded that of the last deceased tenant, so that they had in fact already coalesced with the inheritance at the time the inheritance devolved upon the deceased.

Lastly, the relation of *outgone* to *income* tenant is one which follows as a natural deduction or corollary from the principles we have established. In examining this relation, the first point to be considered in connection with it is this,—the precise state of matters existing between the *outgone* tenant and his landlord at the time of the outgoing of the former. If there be nothing special in that relation, then the *outgone* tenant immediately he is *outgone*, ceases to have any right to the fixtures, whether defeasible or indefeasible interests in land which he may during his term have set up; and the *income* tenant therefore takes the land *plus* all these fixtures, and is entitled to hold them for the term of his tenancy without interference from anyone, whether landlord or *outgone* tenant. This *income* tenant has not, however, any property or interest in them as fixtures; but his interest in them so far as it extends, is an interest which arises under the *demise*, the fixtures being already part and parcel of the inheritance. Again, if any special stipulation or agreement has been entered into between the incoming tenant and the outgoing one, and that agreement or stipulation has been entered into with the concurrence or knowledge and assent (actual or construction) of the landlord, then the terms of that stipulation so far as they modify the landlord's legal rights will as a matter of course bind the landlord, and so will regulate the relation between the *outgone* and the *income* tenants. It is, however, sufficient to observe briefly of this relation in conclusion that it becomes *derivative* through the medium of the landlord; and that once become such, it is regulated by the same or like principles which we have seen and found to regulate all the other derivative relations before mentioned and treated of.

ART. II.—SANITARY LEGISLATION, CONSIDERING PARTICULARLY THE RECENT REPORT OF THE ROYAL SANITARY COMMISSION.

OF all subjects which can engage the attention of the legislator, none can be fraught with more importance to individuals, to society, and to the State, than that of the public health. The welfare of a State must depend to a great extent on the health of its members. To contend that a State which enforces the laws of health does not in intelligence, in morality, and in good government excel a State which disregards them would be idle. It seems somewhat bold to make observations so obvious as these, and it would be wearying to continue in such a strain. And yet, if it be bold, or tedious, or both, to dwell on the importance of discovering and enforcing the laws of health, all the more strange does the comparative neglect of the matter in this country, in all except quite recent times, appear.

Our ancestors seem to have been either so fine in physique that they were above sanitary considerations, or so poor in intellect that they were beneath them. At all events, the instances of their attempts are so few, that, on account of their scarcity, they find their way into the category of things curious. And the student of sanitary legislation in this country will find that almost all which need occupy his attention has been done within the last forty years. It is proposed to consider the object and report of the Royal Sanitary Commission, but as it is only possible in the limits of this paper to treat a part of so condensed and exhaustive a report, it is intended to discuss how far the proposed new Statute is likely to achieve that which should be the end and object of the legislator on public health.

The objects for which the Commission was appointed were, to inquire into and report on the operation of the

sanitary laws in England and Wales, with the exception of the City and the metropolis, so far as these laws apply to sewerage, drainage, water-supply, removal of refuse, control of buildings, prevention of overcrowding, and other means of promoting the public health. Also to inquire into the operation of the laws for preventing the introduction and spreading of contagious and infectious diseases and epidemics affecting the health of man. Also to inquire into the constitution of central and local authorities charged with the administration of such laws, and the formation of areas proper to be controlled by local authorities. To inquire into the system of death registration, and to suggest improvements in all or any of these matters, and the means proper for carrying into effect the suggested improvements.

The Commissioners sum up the result of their labours in this sentence (p. 3):—

“The general purport of our Report is, that the present fragmentary and confused sanitary legislation should be consolidated, and that the administration of sanitary law should be made uniform, imperative, and universal throughout the kingdom. We propose that all powers requisite for the health of towns and country should be possessed by one responsible local authority, kept in action and assisted by a superior authority.”

The report then commences with an interesting history of sanitary legislation in this country down to the present time, from which it appears that what little legislation there was down to 1831 was usually the result of panic, caused by some extraordinary attack of pestilence or contagious disease. Of this year 1831, the Commissioners say, “The alarm caused by the ravages of Asiatic cholera in 1831 led to the first move in sanitary reform.” The report then contains a *resumé* of all the commissions that have been appointed, and Statutes passed from 1831 to the present time.

Having executed this tremendous task, the Commissioners give this summary of reasons for the imperfection of our present system (p. 22):—

"We have therefore to consider amongst the causes of imperfect sanitary administration, the variety and confusion of authorities ; the want of sufficient motive power in the central authority, the non-coincidence of areas of various kinds of local government ; the number and complication of enactments ; the needless separation of subjects ; the leaving some general Acts to voluntary adoption, and the permissive character of some Acts ; and the incompleteness of the law."

The report then contains observations on the evidence, and on the importance of the subject (p. 15) the Commissioners say :—

"Towns and populous districts which have adopted the Public Health and Local Government Acts, or have obtained and acted under special legislation, are much better provided with the requisites for public health than those which have not.

"Mortality is greatly increased by want of sanitary provisions ; a marked reduction of the death-rate has followed the improvement of drainage and sewerage, and the supply of other obvious sanitary requirements.

"Many causes of disease are preventible ; and much chronic weakness and incapacity for work are the result of sanitary negligence, and want of the ordinary requisites of civilised life.

"A large proportion of the population, both in town and country, is habitually drinking polluted water.

"A considerable portion of the working classes is debilitated, and thrown into sickness and poverty by a tainted atmosphere and unhealthy dwellings. No class is exempt from these evils."

They observe on the physical and moral evil of over-crowding, and on the unpunished neglect of possible and prescribed means for the prevention of smoke.

Observing on the close connection between physical and moral pollution, they state, that—

"The Registrar-General's returns show that the black country presents the blackest calendar to our Assizes, a fact which practically illustrates the effect of filth and sunless atmosphere on the minds as well as the bodies of the sufferers. The mere money cost of public ill-health, whether it be reckoned by the necessarily increased

expenditure, or by the loss of the work both of the sick and of those who wait on them, must be estimated at many millions a year."

We have now seen the views of the Commissioners on the laws that have been made, and their results. Also some of their observations on the "importance of the subject" on which it is proposed to legislate. Let us now consider the "proposed new Statute," keeping within the limits laid down at the commencement of this paper, and in doing so, we propose to take as a standard, wherewith to compare it, the sanitary laws of Moses; the most complete sanitary system of which we are aware.

One difficulty in the way of satisfactory sanitary legislation has been, that seldom, if ever, is combined in the legislator the knowledge of the man of science, and the wisdom of the lawgiver. But, in the case of Moses, this difficulty did not exist, for he was a thoroughly scientific man, and the wisest of lawgivers. The result is a practical, complete, and sound sanitary system. The aim of this system evidently was, to embody and enforce the natural laws of health, under which we all live. This system required that, above all things the people should be clean. That they should follow a judicious system of diet, carefully avoiding all food which, owing to climate or otherwise, was likely to be unwholesome. That their houses should be properly constructed. That if any disease appeared, it should be at once brought to the attention of the proper officer, and if he pronounced it to be contagious, a system of perfect isolation should be adopted. That infected houses should be purified, and if purification were not successful, they should be destroyed.

And in the matter of drainage our suspicions would be confirmed were we informed that the idea of the earth-system first dawned on the mind of its reverend inventor whilst in the course of his clerical duties reading the Book of Deuteronomy. They whose duty it was to superintend the carrying out this system were taken from the most educated

class of the people. The people were taught that it was right that they should observe these laws: they were also taught that if they obeyed them it would be well with them and their children; but that if they disobeyed them, they would be afflicted with fevers, nervous complaints, and many other disorders.

Let us see what the New Statute proposes to do in a matter so important to the public health as the first of the above directions—the cleanliness of the people. This naturally causes us to turn to that part of the proposed “New Statute” on water supply. But, first, is the present supply of water sufficient? We heard Mr. Glaisher, of the Royal Observatory, Greenwich, say, in a public lecture, that when once on a commission appointed to inquire into this subject, he met with hundreds of cases where a poor woman had to go so far to fetch water, that the labour of taking it to her room was such as to render it physically impossible for her to keep herself, her family, and her dwelling in a state of wholesome cleanliness.

The remarks on the subject of water supply, p. 38. of “The Observations,” begin in this way: “The question of water supply may be said to involve more serious difficulties than any other subject referred to the Commission.” And the subject is discussed through the four following pages. We looked in vain for some such remark as this—It is expedient that every dwelling should be properly supplied with water, and in such a manner as to entail the smallest amount of labour in obtaining it. No; the pages are taken up with a discussion on the powers, duties, and rights of authorities, boards, and companies.

But these are the words of the proposed New Statute (p. 90):—

“They (the local authority) may themselves furnish the water, or contract with any person or company when it appears to the local authority, *upon report of a surveyor*, that any house is without a proper supply of water, and that such supply of water

can be furnished thereto at an expense not exceeding twopence, on the water-rate authorised by this Act or any local Act."

And (p. 92):—

"The local authorities shall give written notice to the owner, requiring him to obtain a proper supply," &c.

On default they may, *if they think fit*, obtain such supply. If it be expedient that the dwelling of every poor person should be supplied with water, these sections are not sufficient. If the absence of cleanliness is ever the cause of disease, and disease the source of increase to the rates, the supply of water should be imperative. Under the former of these sections, everything is left to the judgment of the surveyor; and, under the latter, a discretion is given to the local authority, "*On default of the owner, they may if they think fit, obtain a proper supply.*" The usual allowance on board ship for both drinking and cooking is eight pints per head daily. And for cleansing the person, clothes, and habitation, Dr. Parkes, the author of "*The Manual of Practical Hygiene*," estimates four gallons per head daily as the smallest amount; and if perfect cleanliness is to be secured, and baths taken, at least sixteen gallons per day are required. Let us take a common case; a man and his wife, with six children, living at the top of a house. If there were a supply of water a hundred feet from the house (according to Mr. Glashier, a very common case), the surveyor might possibly report that sufficient; but, if the supply reached the basement, both local authority and surveyor would very likely be quite satisfied. Taking the height of the house at only fifty feet, according to the lowest estimate given above, the mother of this family would have to raise about three hundredweight a height of fifty feet, every day of her life: and to supply her dwelling with that amount which Dr. Parkes describes as the least necessary for perfect cleanliness, she would have to carry up nearly half a ton daily. If cleanliness with the upper

classes always represented this amount of labour, would not the expression, "the *great* unwashed," bear probably a double meaning?

We would suggest that the scientific officers of the central authority should be called upon to say what supply of water is proper for health, and this being once established as a rule of health, the local authorities should be allowed as much discretion in adopting it as the Commissioners propose that they should be allowed in adopting the new Statute.

On the subject of cleanliness, Chap. VI. (p. 104) is on "The Cleansing of Houses." The Commissioners propose to add to the list of animals (hitherto limited to swine) which may not be "kept so as to be a nuisance to any person," goats and poultry.

If it be established that swine, goats, and poultry are the only animals which can be kept so as to be a nuisance, following what has been said above, the rule should be made hard and fast. But in this, and every other case, if it be not established as a rule of health, would it not be wise to give a discretion to the sanitary inspector? Such a discretion that were rabbits, a fox, or any of the smaller carnivora kept so as to be a nuisance, the Act might be put in force.

The principle of this section should be, not merely to protect the neighbours, but also the owner of the animals, from that which is unwholesome. Is this clearly expressed?

Let us mention a case which, if the Statute does not at present meet, it ought to be altered to cover. It was proved in a case, tried about a year ago, in the Queen's Bench at Westminster, that costermongers in the East-end of London usually inhabit but one room, and that at night they retire to this room with their barrows and their stock of vegetables or fish. Accommodation should be provided for their stock-in-trade that they might not sleep under circumstances so injurious to health. The Commissioners then propose the re-enacting of some provisions of the "Public Health Act," which,

in effect, allow the removal of hot-beds for fever, when made, and one which, if vigilantly carried out, would not allow their ever being made. It provides that if on the certificate of the officer of health (if any), or of any two medical practitioners, it appears to "Local Board" that a house, or any part of a house, is in such a filthy or unwholesome condition that the health of any person is affected or endangered thereby, notice shall be given, and in default, the local board *may* (why not *shall*?), do the work. For this offence, of having a house in an unwholesome condition, there is a continuing penalty, not exceeding 10s. nor less than 1s. per day.

To give a reason why this should be read *shall*, and not *may*, would be to repeat what has been said above on the same point. The importance of this provision renders it all the more necessary that a sufficient water-supply should be peremptorily enjoined, for it would be contrary to natural justice to punish a man for having an unclean dwelling, when water was practically denied him.

The next provision in our list of the sanitary laws of Moses was as to food.

One would imagine that, in the interests of public health, the central authority would be armed with some power to prevent, as far as possible, the supply of unwholesome and adulterated food to the people; but the proposed New Statute is silent on the subject.

Much of the disease of the poor of this country is attributable to the unhealthy sites and miserable construction of their dwellings.—See "The Homes of the Working Classes," by Hole. We turned, then, with interest to that part of the proposed New Statute which deals with this subject. Bye-laws may (again the permissive word) be made (p. 112) by the local authorities with respect to the structure of walls and ground floors of new buildings, for securing stability, and the prevention of damp and fire; with respect to the sufficiency of space about buildings; to secure a free circulation of air and the ventilation of buildings; with

respect to the draining of buildings, and for securing dryness of site, thus re-enacting similar provisions contained in "The Local Government Act," with the addition of the clause to prevent damp and ensure dryness of site. And if we turn to the chapter on mischiefs which fall within the definition of "Nuisance" (p. 119), we find one of these mischiefs to be "any inhabited house, or any inhabited part thereof, admitting rain, or other water, so as to be injurious to health." And with the addition of the power of making a bye-law with respect to "providing adequate means of ingress and egress in the case of all buildings used for public worship, public entertainment, public meetings, and the like." We would suggest that, as bye-laws may be made with respect to walls and ground floors of new buildings, for the prevention of damp, roofs should also be included; for if the roof be not water-tight, the house would come within the definition of "Nuisance" (p. 119). But this is not, it seems to us sufficient; if the proposed "New Statute" pass in its present form, those people inhabiting rooms anywhere but just under the roof will be protected, while the uppermost rooms may be dangerously damp, so long as the roofs are just water-tight. Those who inhabit attics do not usually dwell there from choice; this class, being helpless, should be the first to find assistance at the hand of the law, or, at any rate, should not be the only one left unheeded in the damp. We are inclined to think that this must be an oversight.

Referring to the work which we have cited above on this subject, it will be seen how general has been the neglect of all sanitary precautions in the construction of buildings, particularly of such as the Commissioners now seek to enforce, which would secure a dry, ventilated house, on a healthy site. On the subject of site and construction, we will here make an extract from an able paper which we lately heard read by Dr. Elizabeth Blackwell. Speaking of the dwellings of the poor, she says, "The external walls are too thin, the rooms too

small, no ventilation, brick or tile floors, cottages are frequently built in marshy situations, and by stagnant water, or at the foot of hills, where there is no free circulation of air." Dr. Blackwell also says, "By a law which at present is quite constant, the mortality increases rapidly with the density of the population." And in the importance of ventilation, we will add, that, in addition to all other evils flowing from the neglect of it, it may now be taken as established by Dr. Parkes's Sanitary Report of the Army for 1865, that not only phthisis, but other lung diseases, may have their origin in breathing an atmosphere contaminated by respiration. We see from the authorities cited, the importance of the subject, and that reform is necessary.

The nature and amount of the change effected, and indeed the success or failure of this chapter, of the proposed new Statute, must depend almost entirely on the bye-laws. It is then hardly possible to over-estimate their importance. It seems to us that, if not drawn up by the central authority, assisted by the advice of those most eminent in sanitary science, some general rules should be laid down for the guidance of those who may have to draw them. If we turn to the chapter in the proposed new Statute on Bye-laws (p. 143), we see it is submitted among other things to provide "that the central authority should not sanction bye-laws without a report from their own inspector." The framing of rules governing the construction of buildings with respect to dryness of site, prevention of damp, ventilation, and in conformity with every other sanitary requirement, must need more scientific knowledge than most local authorities have hitherto shown themselves possessed of. If the provision cited above is intended to meet this, the carrying out of the suggestion we have given, namely, the central authority making rules in accordance with the knowledge which they have at their disposal, would get rid of the difficulty, and so of the necessity for meeting it.

We propose to take together the two next subjects on our list, Infection, and the office of Sanitary Inspector. It is impossible that the provisions of a Sanitary Act can be carried out by mere routine. Success must depend on the integrity, energy, and knowledge of sanitary science of those whose duty it may be to put the Act in force. And in the "Observations" (p. 34), the Commissioners speak in the highest terms of the medical officers, of their professional skill, their good sense, their humanity, their acquaintance with the poorer classes, and of their opportunities for tracing the sources of disease.

On the other hand, speaking of Local Authorities (p. 71), the Commissioners say nothing of the past. They describe the importance of the work, and the difficulties that must be met; they dwell in eloquent terms on the qualifications which will be required by those administering the new law. Among other virtues, they must be able to overcome prejudice, and to quicken inactivity to exertion; they must also possess sound judgment. Judging from the touching appeal with which the "Observations" conclude, that men possessing these rare qualities will come forward, we cannot help inferring, that in the opinion of the Commissioners, local boardsmen have not usually come up to this standard. With, side by side, a strange silence as to the past of this local authority, and a high eulogium on the medical officer, we are surprised to find in the two following sections a discretion vested in one case in the local authority, and in the other in the justices. "If the local authority" (p. 126) "*be of opinion*, on the certificate of a legally qualified medical practitioner," that the cleansing or disinfecting of any house, or any part thereof, and of any articles contained therein, likely to retain infection, would tend to prevent or check infectious or contagious disease, *it shall be the duty* of the authority "to give notice to the owner or occupiers, and in default do the work. And in the case of removing to a hospital any person suffering

from infectious or contagious disease, on certificate from a medical man the justices *may* order his removal."

If it be in accordance with a rule of health, that an infected house or clothes should be purified, and that a person suffering from infectious disease should receive such treatment as will remove it and prevent the disorder spreading, should it not be the *duty* of the local authority, on being informed by the medical officer of the existence of the necessity, to do the requisite work? and should not the order of justices follow, as a matter of course, the certificate that removal was necessary? A medical man, possessing special knowledge and experience, certifies that a house is infected, and that it is necessary for the public health that it should be purified. The New Statute proposes that it shall be the duty of a board (consisting, perhaps, of a banker, a publican, a retired butcher, and an architect) to do the work, if, *in their opinion*, it is necessary; in other words, if, in their opinion, the man of sanitary science is right. If local authorities could be relied on for always exercising a *wise* discretion, then, no doubt, all would be well.

On this matter, we will refer to a paper on "The Prevention of Infectious Diseases," read by Mr. Moody, the secretary of the College of Physicians. He gives an interesting account of what has been done in the city of Bristol, how every provision that science could suggest as likely to prevent disease has been carried out, and how, by the exercise of tact and intelligence, the dwellings of the poor have been entered, and numerous sanitary precautions adopted. The result is, as proved by statistics admitting of no doubt, that thousands of lives are saved every year in Bristol. In this case, health officer, board, and people work amicably and intelligently together for the common good. But were it necessary to show that this is not always so, we should refer to the doings at Leeds, and the account of the Pig Protection Society, in a pamphlet by Dr. Stewart.

But as these important sections now stand, the prevention of infection depends as much on the discretion of the local authority as on the skill of the health officer.

The remarks in the "Observations" (p. 32), on the health officers are extremely important. On p. 33, the Commissioners say that the sanitary officers are too often ill-paid, and they hope that their salaries will improve with the improvement of the service. To prove that this, though apparently slight, is a matter requiring attention, we will quote a passage from Chambers's *Cyclopedia*: "An instructional minute of the General Board of Health, dated December 20, 1855, says he (the sanitary inspector) will make himself familiar with the general features of the place, with its previous sanitary state, and with its existing provisions for health—namely, the levels, inclinations, soil, wells, and water-springs; with its meteorological peculiarities, with its burial-grounds, slaughter-houses, lodging-houses, &c. He will see to the general healthiness of his district, making inquiries as to the construction and condition of houses, examine the drinking-water, and observe whether diseased meat and adulterated articles of food are exposed for sale; and report wholly and generally to the Local Board."

"These are but a few of his duties, for a proper performance of which, as the minute goes on to add, 'special qualifications in science are required. These lie in pathology, including vital statistics, in chemistry, and natural philosophy.' For these accomplishments the town of Aberdare offers eightpence-halfpenny a day—for inspecting the sanitary condition of its 35,000 inhabitants; and Paisley, with 48,000, gives 20*l.* a year. A salary of but 50*l.* a year is a common case. Glasgow, the richest town in Scotland, gives only 200*l.* a year to Dr. Gardner, our greatest living hygienist. The highest salary, 1000*l.* a year, is paid by Liverpool." On the importance of the special qualifications of the health officer, we cannot do better than quote another paragraph from Dr. Elizabeth Blackwell's paper:—"Above all other

classes of men, it is certainly important that physicians and medical men generally should be thoroughly educated in sanitary knowledge." She then gives some of the advantages that would follow from this, and continues:—

"But medical men are not taught that it is equally their duty to prevent disease as to cure it; and their attention is not, therefore, sharpened to observe and to deprecate the numerous habits in family life which tend to produce disease. There are but two chairs of hygiene in connection with our medical schools, and attendance upon those lectures is not obligatory, *i.e.* it is not essential to the attainment of a degree. . . . One of the most beneficial changes that could be introduced into medical education would be the establishment of hygiene as a first-class chair, of equal importance with anatomy; a searching examination in the teachings being indispensable to the attainment of any degree which gives authority to attend the sick."

That the carrying out of this suggestion would be to the interest of the public health seems hardly to admit of a doubt. That any men are educated in the prevention of disease, in other words, as public health officers, is owing to the accident of their individual exertions. According to the report, there are now about 4000. medical officers, and from the quotation given above it would appear that not one of these has, of necessity, received any instruction in the prevention of disease. If the prevention and the removal of disease are not two distinct professions, they must be, at any rate, two distinct branches of a profession, and we have seen that qualification in one branch does not necessarily involve any study of the other. As in many cases the choice in the appointment of medical officers must be limited, it would be useless to insist that the applicant must have attended a course of hygiene.

The question would seem to be more for the consideration of the Universities, the College of Physicians, and the College of Surgeons, whether, by carrying out the suggestion quoted above, they would not be assisting the central authority in promoting the health of the people.

We have now considered some of the points on which it is proposed to legislate, which most affect the class which particularly needs sanitary supervision. In comparing them with the Mosaic law, on the same subject, one cannot fail to be struck with this, that the sanitary laws of Moses seemed to enter, as it were, at once into a man's house; and, at the same time that they commanded him, they showed him the advantage of all his habits being regulated by sanitary considerations. His system brings about the health of the community, by taking care of that of the individual. On the other hand, by our system, measures are passed affecting society collectively, and when the law finds itself on the threshold of the individual, it falters long, and when it enters, does so timidly. We are examining the two systems merely from a sanitary point of view. It may be urged that the Oriental climate rendered the strict rules of the Mosaic system necessary. Quite so; and yet an English climate has its dangers too. Here houses may be built in damp situations, with walls so thin as to render dwelling within them dangerous to health. It may be said, the feeling of the people here is such, and all their traditions of that kind, that they would never tolerate any interference with their personal habits. And this may account for the apparent timidity of many of the sections which it is proposed to re-enact in their present form. For instance, a medical man certifies that a house is unclean, and purification necessary. It is the duty of the elected representatives of the householder to order the necessary steps to be taken, if in their opinion that will tend to check contagion.

It may be that when advising that the adoption of the New Statute should be peremptory, the Commissioners think that as decided a step as dare be ventured on at present, without risking the success of the whole measure. But it is to be hoped that the New Statute will avoid the necessity of any extensive sanitary legislation for some time. If the sections in the old Act, interfering with the

liberty of the subject, or, to be strictly accurate, the liberty of the dirty subject, were experimental, and, as such, have been attended with success, is it too great an experiment to leave with the man who has the scientific knowledge the discretion of acting on it? After having broken down the time-honoured privilege of an Englishman, that he might have as filthy a house and be as unclean as he chose in it, this does not seem a startling change.

Hitherto we do not seem to have regarded the office of medical inspector as so important a post as Moses thought it. But as it is clear from the "Observations" (p. 32) that the Commissioners are aware of the change that is necessary, we must place our hopes in the new central authority. One cannot but be struck with the soundness of Moses' view in estimating the office so highly. Apart from the important material results, that would attend the successful labours of the health officer, the work of those whose duty it is to see to the health of the minds of the people would (according to the Commissioners) be rendered much more fruitful.

Though the last in our list of the peculiar features of the Mosaic sanitary system seems hardly within the limits of sanitary legislation, one can scarcely be diverging when noticing it, for it underlies the success of every system of public health legislation. We refer to the education of the people in sanitary matters. By the Mosaic system the people were taught the advantages that would flow from obedience, and the evils that would follow disobedience of the laws of health. We fear we have simply nothing to compare with this wise plan. The Commissioners speak (p. 71) of the "very insufficient information" of the great body of the people in questions affecting public health. In matters affecting their property or their liberty many will, if they can, evade the Act, and if not able to do that, they will obey and grumble, thus putting sand into the machinery

of the law. To change this sand to oil must be the work of education, and education alone.

Taking it, that the object of the legislator on public health should be to improve the health of the community, and of all members of the community, we propose to give very shortly what seems to us the pervading spirit of the Mosaic system, and the striking features of the "proposed New Statute," and leave our readers to determine which, as a system, is best calculated to ensure a healthy society.

The proposed New Statute bears on it the signs of having been steered very carefully through conflicting interests and contending opinions, and the skill with which the Commissioners have brought it through these is marvellous. Though in every particular those advising the adoption of the New Statute seem to have been alive to what was wanted, as every proposal clashed with some interest or prejudice, the suggested improvement in almost every instance seems the result of a compromise, or of hesitation. The spirit of the Mosaic system seems to be this, let it be clearly established as a rule of health that this course should be followed, or the other avoided, no matter to what detail it descends, that rule of health is made a binding law. All rights were made subservient to the public health. A man seemed to lose his personal liberty with his health, that is, if he was attacked by a contagious disease, he was isolated, and freedom only returned with health. A man was as much prohibited from injuring another, by scattering abroad the germs of fever, as by assaulting him with his fists. The public health was treated as a public right, and as such all private rights gave way to it.

ART. III.—ON THE TRANSMISSION OF BILLS OF LADING AND OTHER NEGOTIABLE INSTRUMENTS BY TELEGRAPH.

AS the subject described in the heading to this article will probably be new to most of our readers, it will perhaps be best for us to arrange the various points involved in the consideration of it in the order in which they first occurred to us.

The question was first suggested to us by a case in the Court of Chancery respecting bills of lading, and as possibly some of our readers may not be familiar with these documents, we will commence by stating shortly what a bill of lading is. A bill of lading is a receipt given by the master of a ship for goods placed on board her. Its form is liable to be varied at the desire of the shipper, but it will be generally found to contain an accurate description of the goods, with an acknowledgement by the master that they have been placed on board his ship, and an undertaking by him to deliver them at the port of destination to the shipper or such person as he may order. The shipper then generally sends this bill to the person to whom he wishes the goods to be delivered at the port of destination, endorsing on it an order that they are to be delivered to that person, and the person indicated then takes the bill to the ship when it arrives and claims the goods. It is not, however, necessary that the goods should be claimed by the person immediately named by the shipper. A bill of lading is negotiable, like a bill of exchange, and may be endorsed any number of times, and the right to receive the goods always passes with it. By means of it, therefore, the goods may be sold before they have arrived, and without it the intended consignee cannot make a title to the goods at all, and a valid security upon the goods may therefore be created by a deposit of the

bill of lading. We may mention also in view of some remarks we shall have to make at a later stage, that a bill of lading is generally signed in triplicate. The object of this is to enable it to be transmitted safely by post. The first and second parts are sent independently to the consignee, just as a bank note is often sent in two halves, and the third part is kept ready to be sent in case of a miscarriage happening to either of the first two parts. With these preliminary remarks we will state shortly the circumstances of the case in the Court of Chancery, which suggested to us the subject of this article.

A merchant had ordered goods to be sent to him from some distant country; he had been informed by telegraph of their shipment; and being in want of money he obtained a loan on giving a promise in writing to repay the money out of the produce of the goods, and for security to hand over the bills of lading to the lender as soon as they arrived. He was then adjudicated bankrupt, the bills of lading fell into the hands of his assignee, and the question was whether the person who made the loan was entitled to the produce of the goods, or whether they belonged to the assignee for the benefit of the general creditors.

Without stopping to discuss the question in whose favour this point ought to have been decided, we will at once call attention to the thought that it suggested to us, that is to say, that it is most desirable that a merchant, to whom goods have been shipped, should have the power of giving a good security upon them, as soon as they have been actually consigned to him. A moment's reflection will show that this end would not be obtained by merely deciding the case we have mentioned in favour of the lender. Supposing such a security as that there given to be good against the borrower's assignee or trustee in bankruptcy, what is to prevent the merchant from borrowing in the same manner from half-a-dozen different persons on security of the same goods, and what will then become of the security? Clearly all the lenders but one would

find their security worthless, and if when the bills of lading arrived, the borrower did not keep any one of his promises, but sold the bills to some third party, all the former lenders would be excluded altogether. It may safely be affirmed, therefore, that at present there is no mode by which the consignee of goods can raise money upon the security of them until he receive the bills of lading, and this must necessarily be long after the shipment, and perhaps even after the arrival of the goods. If therefore he requires money during this interval, he may find himself unable to raise it at all, or only able to raise it at a very high rate of interest; and that although he is possessed of property far more than sufficient to repay the loan he requires. His property being at sea, he may find himself financially at sea also. Now if we could devise a method, whereby as soon as the shipment of the goods was announced to the consignee by telegraph, he could sell them or give an effectual security upon their proceeds, he would be able at once to raise money upon favourable terms to an amount differing only by a slight margin from the full value of the goods themselves. The money thus raised might then be employed in some other commercial adventure, which could not now be undertaken at all, and the man's money might be turned over, as the saying is, much more rapidly than can be done at present. Thus we should stimulate trade, by extending legitimate credit, that is to say, by enabling credit to be given, where it deserves to be given, which increases, in fact, the available capital in the world. The more certain also we make credit, that is to say, the more we enable all persons worthy of credit to show their title to it, so much the more difficult do we make it for persons who do not deserve it to obtain it under false pretences, and defraud their neighbours of their money. If we could but devise a simple and certain method of supplying every person with a title deed to all credit that he really deserved, we might oust misplaced credit altogether from the field, and relieve ourselves of all further fear of bankruptcies and panics, and the losses caused by them.

We cannot, of course, hope to arrive at this state, but we may make some efforts to come a little nearer to it than we are at present, and diminish the frequency and intensity of the evils caused by misplaced commercial confidence. A scheme by which the consignee of goods could make a title to them, the moment he was apprised by telegraph of their shipment, would, we conceive, be a step in this direction.

We will assume, therefore, that the law ought to enable a man, to whom goods have been shipped, to give a good security upon them as soon as their shipment is intimated to him by telegraph. We then have to consider next what provisions it would be necessary to make in order to enable this to be done. First then, in order to make one security effectual we must deprive the man making it of the means of giving another. That is to say, it will not be sufficient that he should show the telegram to the lender and give a charge in writing on the goods or their proceeds, for he might repeat that process to half a dozen people, but he must also give up the telegram to the lender, and the possession of it must be essential to the validity of the security. For the same reason we must take care that our borrower shall not obtain more than one copy of the same telegram, and our law must, in fact, forbid the issuing of these telegrams in duplicate. Again, we must provide measures for preventing the correspondent in the foreign country from sending more than one telegram relating to the same goods, or sending a telegram when there are no goods at all. And for this purpose it would seem that it ought not to be left to the private individuals to send the telegrams, but that an office, under the control of the Government, should be established, in order that its messages might be known to be authentic.

There is also another consideration which will lead us to this same conclusion, and that is that ordinarily the bills of lading carry the right to the goods; supposing, therefore, a loan to have been effected on some goods, of which the shipment was notified by telegraph, still, when the bills of lading

arrived the recipient of them might, as he may now, raise money on a deposit of them, or sell the goods by their means, notwithstanding the previous security effected on the telegram. It might also happen that the shipper of the goods, after sending the telegram, might himself transfer the bills of lading to another person, mortgaging them to a bank (say) in his own country, and the bank would then send them to their correspondent at the port of destination, who would clearly have a title to the goods. Our law should of course provide for these emergencies, and the best means of doing so would seem to be the institution of a responsible office, which should examine the bills of lading and stamp or write upon them, in the languages of both the countries of shipment and destination, a short note saying that the rights originally annexed to them had been disannexed by telegraph. This cancellation of the bills of lading, be it observed, is the vital point in our scheme. It should of course be a criminal act for any person to present fictitious documents for the official stamp, and the office should have power to require proper proof from any person presenting documents, that he was really entitled to the rights which they purported to confer. The best means of defraying the expense of the public offices would probably be by charging a small fee for stamping the documents and for announcing the fact by telegraph to the person to whom the message was to be sent. It might be desirable at the same time, as a further precaution against fraud, that one of the copies of the bill of lading should be left at the office to be transmitted by post to the person indicated.

We have hitherto spoken only of bills of lading, but the considerations we have entertained may very well lead us to go a step further and inquire, whether the same system might not be extended with advantage to bills of exchange promissory notes, bank notes, and other documents. The general effect of such an extension would be to enable all mercantile matters to be transacted by telegraph, which can now be done by post. The expense of transmission by

telegraph, would of course be greater than that by post, so that recourse would not be had to the former unless the saving of time would more than compensate for the extra expenditure. If we had space to enter into the details of commercial matters, we could easily show that this would often be the case, and that a system which provided for the instantaneous remittance of money would enable many dealings to be effected more advantageously than at present, and many others to be undertaken which cannot now be transacted at all. In particular we may point out that in the dealings which take place between banks in different parts of the world, a means of transmitting money almost instantaneously would be found of very great practical utility. - People often require to have a remittance of money made to them in less time than the interval required for the delivery of letters by post. This can be done at present only in the following way. A at London, say, telegraphs to B at New York, to remit a sum of money to him, B then pays it into a bank at New York, that bank telegraphs to its correspondents in London, and they give A credit for the sum. This appears satisfactory enough, but let us observe that in order to enable the transaction to be completed it is necessary that the bank at B's locality should have a correspondent in A's locality, who would be willing to give it credit for the sum to be remitted. If instead of supposing New York and London to be the two termini of the operation, we took two provincial towns in England and America, this would rarely be the case, and the remittance could then only be made by the help of one or two more intermediaries, whereby time would be lost and expense incurred, for a commission would often be charged on such a remittance, and the risk would be run of putting a weak link in the chain. Now, if the system we are advocating were in operation, no bank would find any difficulty in obtaining credit on an emergency from another bank at a distant town, since it would only have to transmit an approved security of the

amount for which credit was required; or a remittance might be made without risk of loss direct from one individual to another without the intervention of banks at all, and without the necessity of paying any commission.

Considering it then to be both desirable and practicable that the rights annexed to the documents we have mentioned should be transmissible by telegraph, it would of course be requisite to enable the transferee to obtain from the telegram all the benefits which he would derive from the original documents themselves. We have then to consider what conditions have to be fulfilled in order that this may be done. First, then, it should seem that the transferrer should indorse the original documents, if necessary, to the transferee, and do all other things which might be required for perfecting his title; next, that the telegram should set out the whole of the document, and give official notice that the document set out had been stamped with a telegraph stamp, and the rights annexed to it transferred to the person mentioned. And it would be best that the telegram should be addressed, not to the transferee himself, but to the public officer of the telegraph office nearest to his abode. Then, at the receiving office a fair copy should be made of the document transmitted, on good paper, to be stamped at the cost of the transferee, with the stamp which it would have been necessary to affix to the original document if it had arrived in the ordinary way, and also probably with an extra stamp to cover the expenses of the department. This document might be conveniently called a certified telegram. A clause should be printed in the paper, with blanks to be filled up in each particular case, certifying that an official telegram had been received from the place whence it was sent, stating that a document in the words thereon written had been stamped with a telegraph stamp, and the rights annexed to it transferred to the transferee. This document should then to all intents and purposes represent the original document which had been stamped in the distant country. It should be trans-

ferable by the same means, it should impose the same obligations on an indorser, it should authorise all payments made on the strength of it, and be receivable in evidence in all courts of justice. It should carry, in fact, all the rights belonging to the original document, with the right to possession of that document superseded. It might also be included in the list of documents, whose rights could be transmitted by telegraph.

It would not, in the first instance certainly, be necessary to have a department for the purposes we are considering annexed to every telegraph station, or anything near it. It would probably answer all purposes if there were one in every great port, or great commercial town in every country. The persons desiring to make remittances by telegraph would probably reside in the neighbourhood of these towns, and if they did not do so, they would find little difficulty in getting their business done for them, by means of agents, who would spring up as soon as they were required. With respect to the receipt of remittances, the same remark also applies, but if in any case a remittance had to be made to a person living at a distance from any of the centres, it might be effected by sending the certified telegram to the person indicated by post. A similar system is, I believe, often adopted now in the transmission of telegrams, that is to say, a direction is sent to the master of the office at which a telegram is received, to send it on by post, instead of resorting to the more expeditious, but more costly, process of employing a special messenger.

The next point which requires consideration is, how could the necessary legislation be effected for enabling the scheme we have suggested to be put into operation. It is evident that such a system as we have sketched out could not be established so as to allow of remittances between two countries politically distinct, without the concurrence of the legislatures of both, and this, in a new matter of doubtful policy, it might be difficult to obtain. It happens, however,

that our own country is in a position to be able to set the example in this matter, in many cases by its own act alone, and in others with the assistance only of the legislature of a friendly colony. By a single Act of our own Parliament all the necessary provisions could be made for establishing the system, not only with the United Kingdom itself, but also in all other British dominions which have not independent legislatures. This would include the important dominion of India. Again, it would only require the united action of our own Legislature and that of the dominion of Canada, to establish the system between England and the continent of America. In the latter case it might be found desirable to conclude a convention first, and obtain the sanction of the two legislatures afterwards, though we do not see why it should not be sufficient for each country to provide that if the other established proper offices of transmission, taking all the precautions we have enumerated for preventing fraud, then all telegrams received from its offices should be certified at the receiving offices, and should have the effect of representing the original documents. If the measure proved to be one of commercial value, there can be little doubt that other countries would speedily adopt it. And it would thereby help to increase that mass of common interests between members of different political communities which must ever be the best guarantee for the peace and harmony of mankind.

We will conclude this article by recapitulating shortly the results we have arrived at, arranging them in a little more logical order, and filling in a few details, which did not appear worth noticing before.

(1.) It should be lawful for Her Majesty to establish offices, to be called (say) Bill Departments in connection with any Telegraph office in any of the dominions subject to the jurisdiction of the Parliament of the United Kingdom.

(2.) It should be lawful for any person to take to any bill department any document or documents which is or are evi-

dence of rights enforceable within the same jurisdiction, and the rights evidenced by which pass by delivery, or by delivery and endorsement, of the document or documents; for the purpose of having the rights evidenced by the document or documents transferred by telegraph to any other person.

(3.) The person making the application should deliver the document or documents to the office, indorsed, if necessary, to the transferee, and produce all other evidence (if any) necessary for showing that the rights evidenced by the documents would vest in the transferee on delivery of the document or documents. In the case of a document drawn in a set he should deliver in the whole of the set. He should also specify in writing the name and address of the person to whom he wishes the rights to be transferred, and the office to which he desires the announcement to be sent, such office being one to which a bill department was annexed. And he should deliver to the office a complete copy of the document or documents, and every endorsement upon them.

(4.) It should be a criminal act for any person to present at a bill department any document which did not really represent the rights it purported to represent.

(5.) The officer of the bill department should ascertain that the copy handed in was a correct copy of the documents produced, and he should retain the copy and file it, and stamp every document of title presented to him with the stamp of the office. This stamp should give notice to all persons that the rights originally evidenced by the document on which it was impressed had been dis-annexed from it and transferred away by telegraph. The stamp should bear words to this effect, in the language of the country in which it was impressed, and also in the English language.

(6.) The officer of the bill department should also demand of the person bringing the documents payment of the proper charges, and on payment being made he should return the documents stamped, save only that when the documents stamped consisted of a set of any bill, he should retain the first

of the set, and he should give to the person paying the charges a receipt for the money paid, and also for the document retained, if such were the case, and for the copy delivered in, and on the giving of this receipt, the rights originally annexed to the stamped documents should vest in the person named in the directions as the person to whom they were to be transferred.

(7.) The officer of the bill department should send the document (if any) retained by him, by post, to the person named in the directions in the ordinary way, and should also telegraph to the officer of the bill department at the telegraph office named in the directions, setting out in full the document or documents stamped with their indorsements, and certify that all things necessary had been done for transferring the rights originally annexed to those documents to the person named.

(8.) It should be obligatory on the officer of the bill department, at which any such telegram as aforesaid should be received, to copy out the document transmitted on paper to be provided for this purpose, and to write or fill in on the same paper a certificate or receipt of the telegram relating to the same in the following form:—

“I hereby certify that a telegram has been received at this office from the Bill Department at the Telegraph Office at X., stating that a document in the words hereon written had been presented at that office, and that all things necessary had been done for vesting the rights evidenced by such document in J. S., of

“(Signed) A.B.,

“*Controller of Bill Department, at W.*”

This new document should be called a certified telegram.

(9.) After making out the certified telegram the officer of the department should send it by special messenger or registered letter, as the case might require, to the person named as the transferee.

(10.) The transferee should become liable to pay the stamp which the original document would have required, and also a

further sum to cover the expenses of the department, such further sum to be collected also by means of a stamp. The amount of these stamps should be inscribed in writing on the certified telegram, and the telegram should be valueless until the necessary stamps were affixed upon it.

(11.) The certified telegram, as soon as it was properly stamped, should represent to all intents and purposes the original document; an indorsement on it should entail the same obligations on an indorser; a transfer or deposit of it should have the same effect; it should be evidence in all Courts of Justice, and should authorise all payments of money and deliveries of goods.

(12.) In case the Government of any country, not subject to the jurisdiction of the Parliament of the United Kingdom, should establish, or take means for establishing, bill departments for all or any of the objects for which Her Majesty is to be authorized to establish bill departments, and should take such precautions as might, in the opinion of Her Majesty, be deemed sufficient for the purpose, it should be lawful for Her Majesty, by Order in Council, to declare that, so far as regarded any rights to be enforceable within the jurisdiction of the Parliament of the United Kingdom, the acts of the officers of the departments so established, or so to be established, by the Government of the foreign country, should have the same effect as the corresponding acts of the officers of the bill departments to be established by Her Majesty, with such exceptions, additions, and variations, as the nature of each case might require.

ART. IV.—COUNTY COURT COMMITMENTS.

IT is against County Court Commitments only that these pages are addressed, because their abolition would certainly lead to the doing away with the power of the same

kind at present possessed by the Superior Courts. That this is so must be clear upon a little consideration of two facts. 1st. That the Government in proposing their Bill for the abolition of Imprisonment for Debt only wished to retain commitments in the County Courts, and for cases under £50, and somewhat unwillingly consented to extend the same power to all cases and all Courts when such one-sided and unfair legislation was found to be too much even for an obedient majority. 2ndly. That the Judges of the Superior Courts, unlike those in the County Courts, have no liking for the system, and would gladly see it abolished. They have in fact been trying, ever since the Act came into operation, to get rid of their unworthy work, or at least to send as much of it as possible into those inferior tribunals where it is better received.

Moreover, it is in the County Courts that the hardship of Commitments is most keenly felt, for it is there that imprisonment for debt affects that large class of men who gain their living by their labour. And we may add too, that it is there that the expense to the country is greatest in maintaining the poor prisoners, and often in giving aid to their wives and families while deprived by law of their natural bread-winners.

To Commitments in the County Courts we therefore confine our remarks, and as the opinions of those in high places must command more attention than our own, it is with what was said in the Houses of Parliament against this unjust and injurious system during the passing of the Act that we shall now begin our advocacy for its abolition.

We hope on a future occasion to give our readers what little has been said in its favour, to correct many erroneous statements and opinions, and to support what is here quoted by the evidence of facts and statistics.

The extracts that follow are quoted *verbatim* from Hansard's *Parliamentary Debates*.

The Attorney-General said in his speech for leave to bring in his Bankruptcy Bills, 5th March, 1869 :— .

"As for the principle of imprisonment for debt, if imprisonment was to be treated as a punishment, it was unjust, because it confounded the innocent with the guilty : if it were treated as a remedy recent legislation had made it quite ineffectual. . . . To revert to the old system was impossible ; nothing remained to be done but to abolish imprisonment for debt altogether, but there was one exception to be made to this, and that had reference to the power of the County Court Judges, who had power to imprison in cases where a debtor had means and refused to pay, or where he had contracted a debt fraudulently. He confessed he desired the abolition of this power also, but did not see his way clear to doing so, because almost all the County Court Judges were of opinion that if they were deprived of this power the efficiency of the County Court system would be destroyed. . . . There was reason to suppose that some loose practice had been carried on in the way of committing persons to prison without sufficient evidence. . . . He should be glad to hear this matter discussed, and especially glad if it could be shown that it would be safe to abolish the exceptional power he referred to altogether."

The Attorney-General said in another speech on the second reading, 5th April, 1869 :—

"It was said, 'If you abolish imprisonment for debt, you ought also to abolish it in the County Courts.' Now, no one could suppose that he was favourable to any extension of the power of imprisonment in the County Courts, for he had given earnest of an opposite tendency by introducing a Bill for the limitation of that power, which had before been very much abused. He was not, therefore, too friendly to this power of imprisonment by County Court Judges, and he could only say that he should rejoice if the House could come to the conclusion in committee that this power could be abolished without danger to the working of these Courts."

The Attorney-General also said in a speech in committee, 25th June, 1869 :—

"He should be glad, if he could do so, to abolish even this power of imprisonment, but public opinion was not ripe for such a measure."

The Solicitor-General said in a speech in committee, 29th June, 1869:—

“If the Government could have seen their way to carry this measure without this provision they would willingly have omitted it; but they had been informed upon sufficient authority that the County Court system, as at present constituted, could not be carried on without it.”

NOTE.—In these extracts from speeches made in the House of Commons by the legal representatives of the Government who passed the Bill, we find:—

(1.) The principle of County Court Commitments absolutely condemned.

(2.) That there had been “loose practice” in sending to prison without sufficient evidence, and that the power had been “very much abused.”

(3.) That the Government would be very glad to abolish the power altogether, but cannot.

(4.) That one reason they cannot is because public opinion is not yet ripe for such a measure.

(5.) That the other reason is because almost all County Court Judges say they could not get on without it, and because the Government believe that, as at present constituted, such Courts could not be carried on without this power of imprisonment.

Overlooking the common cant about the ripeness of public opinion, we find that the Attorney and Solicitor-General defend the continuance of County Court Commitments simply upon the ground that the Judges of these Courts consider them necessary for doing the lower legal business of the country under the present system.

To this one argument we will, for the present, give the answer of Lord Romilly, reserving further comment for another time.

Lord Romilly said in committee, 8th July, 1869:—

“The power of imprisoning the debtor for the purpose of enforcing

the payment of debts recovered in County Courts, appears to me to be very objectionable, and to encourage tally-men and an injurious system of credit. I admit that all, or nearly all, the Judges of these Courts are strongly in favour of preserving to them that power ; but they are not, in my opinion, the best judges. And it should be remembered that no adage of the law is more earnestly clung to by Judges than that ;—

‘ Boni judicis est ampliare jurisdictionem, ’—

nor is there one which ought to be more carefully watched and defined.”

We now give a collection of extracts which cannot well be classified, but which all contain the opinions of men worthy of every consideration, from their learning or experience, unanimously speaking against County Court Commitments, as unjust and injurious from every point of view.

Mr. Jessel, 22nd June, 1869 :—

“ The Bill proposed to punish a man because his friends could not, or would not, pay his debt, and to imprison him for an indefinite time. Perhaps until it was possible to get the public mind to advance as far as to say that in no case should a man suffer penal imprisonment because he failed to pay a certain sum of money under a private contract, with which the public had nothing to do, the proposition of the Attorney-General was the best that could be adopted, and therefore he should not divide against it. He trusted, however, that at some not long-distant period public opinion would be in favour of the abolition of imprisonment for debt altogether.”

Mr. Henley, 22nd June, 1869 :—

“ In what was entitled ‘ A Bill for the Total Abolition of Imprisonment for Debt,’ they were giving to the Judge an arbitrary power of imprisonment if he thought the debtors were able to pay. . . . It was now proposed to extend penal imprisonment, for penal imprisonment it was, to all persons.”

Mr. Candlish, 5th April, 1869 :—

“ He believed that imprisonment in cases of fraudulent indebted-

ness was right, but that the man who was merely unfortunate should not be regarded or treated as a criminal."

Sir Henry Hoare, 25th June, 1869:—

"Said he thought the Bill should be called, not a 'Bill for the Abolition of Imprisonment for Debt,' but a 'Bill for the Extension of Imprisonment for Debt.' Retaining power of imprisonment in County Courts for debts under £50, the Bill became a Bill of pains and penalties against the working classes. . . . He would not send to prison the man whose wife or daughter had obtained credit in his name."

Mr. Morley, 25th June, 1869:—

"Said he should have been glad to put an end to imprisonment for debt at once and for ever. It belonged to the dark ages. . . . He thought that the system of imprisonment was bad because it fostered a false and pernicious system of credit—credit which would never have been given but for the existence of this power."

Mr. Barrow, 29th June, 1869:—

"A man was committed and then re-committed, when the first committal had been the means of preventing him from earning money."

Mr. West, 22nd June, 1869:—

"Stated that his position in Manchester obliged him to deal very largely with small-debt summonses, and his experience had led him to conclude that the sooner they were put an end to the better. In the first place the cost to the public of maintaining prisoners and their families was very considerable, but besides that, the sacrifices which the law forced the working classes to make, in order to avoid committal, amounted to a very serious burden. It had been often stated that the County Court Judges were opposed to the abolition of imprisonment for small debts, but the weight to be given to their objection was diminished by the consideration that they seemed to think that society only existed in order to maintain some work for them to do. . . . He had great experience in these matters, and he could say that there was no part of the duty of the Judge in

the Small Debts Court so painful or unsatisfactory as the decisions which he had to give in these cases. How could a County Court Judge give an opinion as to whether a working-man would be able to pay or not?"

Mr. Staveley Hill, 5th April, 1869:—

"If there was one thing more than another which pressed hardly upon the working classes, it was the power of commitment possessed by the County Court Judges. It involved the loss of more labour, the wasting of more money, and the infliction of greater hardship than those who had not had practical experience, or seen statistics on the subject, could easily imagine."

Mr. M'Mahon, 5th April, 1869:—

"At present the County Courts were converted into agencies for the collection of small debts, many of which were incurred by the wives of poor men in consequence of the importunity of the traders. These debts were frequently left outstanding till the harvest season, when the creditors insisted upon payment or sent the debtors to prison, and the men so imprisoned were committed again and again, unless they satisfied the harpies to whom they were indebted."

And on June 25th, 1869, the same Member said:—

"The cost to the county in respect to these 140 prisoners was £136, and the same tallyman, he might remark, had got 63 County Court debtors committed to gaol in Worcestershire in the course of the same two years. It was monstrous that such a power should exist, and it was obviously unfair to throw upon the ratepayers the expense of maintaining prisoners of this class."

Mr. M'Clean, 25th June, 1869:—

"It was a disgrace and a scandal that the ratepayers should be obliged to maintain these small debtors in prison for such trumpery sums."

Mr. Henley, 25th June, 1869:—

"He should like to know what became of all the orders that were

issued. He believed that in most cases the result was that the parish had to keep the man's wife and family."

Mr. Hadfield, 29th June, 1869 :—

"It would be better for the county, as a matter of pecuniary arrangement, to pay every debt for which these poor creatures would be sent to prison, than to keep them there and incur all the cost of their maintenance. He should like to hear from the Attorney-General how often a man might be imprisoned for a debt of 10s."

The Attorney-General does not appear to have answered this ugly question, probably he did not know. We will, therefore, endeavour to do so. Mr. M'MAHON in his speech, 25th June, 1869, instances a case of a man who was imprisoned *six* times for a debt of *seven pence*, with the costs upon it. There is nothing to prevent the same thing happening now. As the proof of means has only to be "to the satisfaction of the Judge," his discretionary power is boundless, and he can use it on any one poor debtor until he gets tired, or until it ceases to be to his satisfaction.

Looking over this long list of opinions, strongly and clearly condemning County Court Commitments from every point of view, and all spoken by men who knew their subject; it may surprise some that the Bill, mis-named for the abolition of Imprisonment for Debt, was ever passed. But a Government with a large majority can pass anything, so that the present Act, like so many others before it, became law against the wishes of those who knew its effects, and almost entirely through the blind obedience of those silent voting members, who knew nothing whatever about the question, and if possible, cared less.

F. M. WETHERFIELD.

ART. V.—THE LAW OF LANDLORD AND TENANT.

A Compendium of the Law of Landlord and Tenant. By WILLIAM MITCHELL FAWCETT, of Lincoln's Inn, Barrister-at-Law. London: Butterworths, 7, Fleet Street. 1871.

A Manual of the Law of Landlord and Tenant. By HORACE SMITH, B.A., of Trinity Hall, Cambridge, and of the Inner Temple, Barrister-at-Law, and THOMAS SPOONER SODEN, M.A., of Exeter College, Oxford, and of the Middle Temple, Barrister-at-Law. London: Davis & Son, 57, Carey Street, Lincoln's Inn, W.C. 1871.

IT is not a little curious that the hitherto undisputed authority of Woodfall should have been simultaneously assailed by the authors of the respective volumes entitled above. But so it is, and the phenomenon, although it may be in part perhaps ascribed to the youth of his assailants, all three of whom were called to the profession of the Bar in the year 1862, and two of them (Mr. Fawcett and Mr. Soden) on the same call-day, yet doubtless it is much more to be ascribed to an admitted want in both branches of the profession, and to the circumstance that all three gentlemen have already in the course of their own respective professional experiences found the convenience of some handier volume of the Law of Landlord and Tenant than is the admittedly excellent but ponderous one of Woodfall.

The expressed aim of the Compendium (the work of Mr. Fawcett), is "to present in a small compass a practical view of the existing law of Landlord and Tenant;" and the author by purposely omitting matters which are of merely historical interest, or which are collateral to his main design,

has succeeded in compressing the whole of his subject within the reasonable compass of 373 pages. A like aim has been kept before the minds of the authors of the Manual (Mr. Smith and Mr. Soden), who have endeavoured to produce a work "which should hold a middle place between the elaborate but expensive treatise of Woodfall, and the outlines contained in the lectures of Mr. J. W. Smith;" and like Mr. Fawcett, they too have compressed their subject within a figure slightly under 400 pages. Moreover, the cost of the two works is the same, being 14s. each. It seems therefore, that however undesigned the rivalry on the part of the respective authors, no two works are more calculated in themselves to become the rivals of each other in the good opinions and practical utilities of the profession. Hence the necessity under which the reviewer lies of dealing with the strictest impartiality by each, neither on the one hand attributing to either the merit which is not its due, nor yet on the other hand derogating from its proper merit.

The most cursory inspection is sufficient to show that the two treatises are of markedly different character in many ways. It may be roughly said of Mr. Fawcett's work, that it is *statutory* throughout, in accordance perhaps with the predominant character of law at the present day; and Mr. Fawcett takes advantage of this characteristic of modern law to impart to his Compendium a degree of *authenticity* which greatly enhances its value as a convenient medium of reference, for he has stated the law (so far as it was possible for him to do) in the very words of the authorities (whether legislative or judicial), by whom it was (or has been) established. On the other hand, of Mr. Smith and Mr. Soden's work, it may be said, that the character, although largely statutory, is less statutory than didactic, and yet is not less *authentic* than is Mr. Fawcett's work; for the authors of the Manual, by like means with those made use of by Mr. Fawcett, have wisely secured for their work also this characteristic merit, than which there is not

in our opinion a greater merit, or one the absence of which is more prejudicial to the permanent utility of a work on law. But Mr. Smith and Mr. Soden have done much more than merely secure the authenticity of their work, they have contrived besides to give to their style the charm of art without either the cumbrousness of artificiality or the perplexity of involution. It may be well to illustrate this difference of character by a reference to the works themselves; and for this purpose we therefore ask the reader to turn with us to pages 22-26 in [Mr. Fawcett's volume, where he will find a bald and simple statement in numerical order of the points and matters requisite to be observed in granting leases to trustees to hold for charitable purposes; and again to pages 88-93, where he will find with the like baldness and simplicity of statement a succession of provisoes for re-entry, accompanied each of them with a brief and bald interpretation of the strict legal import or significance of each. And so also, on pages 226-228, 233 and 234, the whole doctrine of covenants is treated in like fashion. Now all this gives one an idea, that in his compendium Mr. Fawcett has really and merely given us in a connected form the notes which he made (or has made) for himself primarily while a student at the Inns of Court (at which he was an Exhibitioner), and more recently in the course of his rustico-legal avocations in Westmoreland (where he at present practises); and these notes doubtless constitute a series of legal facts or jottings which cannot fail to prove of great utility, we may even say of the very foremost utility, for as notes they are excellently done, but they do not seem to be entitled to commendation as possessing any further or higher merit. Now, let the reader turn with us next to Mr. Smith and Mr. Soden's work, and to any page of it, and we ask, does he not find there a something in the statement and a something in the tone which are nowhere to be found in Mr. Fawcett's work? There is no want of clearness, nor yet of accuracy; but both the clearness and the accuracy are of a

more elaborate character and more artistic cast. We refer the reader in particular to pages 56-65 as affording an admirable specimen of these qualities in the authors' style of execution. The subject of these pages is the distinction between "leases and agreements," or between leases and what are at the best informal leases; and the authors, after stating in clear terms the nature of the question which is before them, take up the cases upon the subject *seriatim*, and stating each of them in its substantial import arrive at length at the conclusion which they give on page 65, in the language following:—

"The result, therefore, to be collected from the preceding decisions is, that an instrument containing words of present demise shall operate as a lease for years; a demise is thereby created, and a mere additional stipulation for the future execution of a formal lease is considered only in the nature of an agreement for further assurance. The intention of the parties is to be collected from the words of the instrument, in the first place; but if the terms of the instrument be ambiguous, the nature of the estate and the acts of the parties may be resorted to as a guide."

And having arrived thus far, the authors next proceed to show the effect upon this result which is to be allowed to the disturbing element of the Statutes of Victoria in the matter of Real Property. Now the passage last referred to, and in part quoted, is typical of many other passages in the work. It clearly appears, therefore, from this comparison,—this limited comparison,—of the Compendium and Manual, that the authors of the Manual have undertaken to treat and to dispose of questions in a style or fashion at which the author of the Compendium has not so much as aimed.

But let us return again to Mr. Fawcett's work. We find in it on page 168 a form of memorandum of appraisement, on page 296 a form of notice by tenant of intention to remove fixtures, and on other pages other like forms of the very first utility and convenience, not only to solicitors, agents, and

others, but also to unprofessional persons (such as manufacturers, engineers, and householders generally) more especially in country districts, where access to some regular lawyer is on particular occasions impossible or inconvenient. Now all forms of this sort are absent from Mr. Smith and Mr. Soden's work. And why? Not because the two latter authors did not know of them, but because (we presume at least, and imagine we presume correctly) they contemplated a different class of customers, and selected their wares according as they judged the tastes, necessities, or wants of these. Now, this being so, we seem to have arrived at some possibility of estimating the two treatises with justness and impartiality; for we have discovered a plain utility to be the aim and end of Mr. Fawcett's treatise, and an ambitious merit to be that of Mr. Smith and Mr. Soden's one; and we have now only to enquire in further estimating the respective works,—whether the respective authors have attained their several ends, and with what measure of completeness, high aims entailing high responsibilities, more moderate aims, more moderate ones.

In order to apply our several tests of merit and of utility successfully, it is desirable to choose some portion of common ground, and to compare with each other the respective treatments of it in the two treatises. We have chosen for this purpose (almost at random, let us say) the subject of “notices to quit,” a subject which is at once of the first importance for the practitioner, and also of the highest interest for the speculative lawyer. Now, in the first place, it is only natural to expect a good deal of common matter within this space of common ground. And we find, in fact, this community of matter. Over and beyond this, however, we find a large amount of very excellent practical information on pages 267-8, 273 of Mr. Fawcett's treatise, not any portion of which is to be found in Smith and Soden; for example, Mr. Fawcett tells us, that where a tenant from year to year enters in the middle of a quarter, and pays rent to the next quarter day, and then onwards from quarter to quarter, his tenancy is held to com-

mence on the quarter day next after his entry; but where he does not pay rent for the fraction of a quarter, then his tenancy is held to commence from the day of his entry: and he quotes an appropriate authority for each section or segment of this "*doctrine of fractional quarters*," as we may call it; we have looked in vain for this doctrine in Smith and Soden. On the other hand, Mr. Smith and Mr. Soden tell us, what Mr. Fawcett nowhere tells us, that where the plaintiff claims the lands by a title paramount to the landlord of the defendant, no notice to quit need be given to the defendant; and again, that no notice is necessary in the case of a mere tenancy at will, or in the case of a tenancy at sufferance, or in the case of a mortgagor who has been allowed to remain in possession. Now, who shall determine whether these latter omissions from Mr. Fawcett's work do or do not detract from its completeness, estimated by the standard of utility alone? And again, shall it be said that Mr. Smith and Mr. Soden have fully reached their higher aim of merit, when they not only omit the important matters which (as already stated) they have omitted, and when besides (as we think, although the point is doubtful) they inaccurately state the result of the decision in *Papillon v. Brunton* (5 H. & N. 518,) unless indeed the word *during* is a mere oversight for *after*? Mr. Fawcett is more accurate here, saying "*after*" instead of "*during*." And yet, on the other hand, who can examine the index to Smith and Soden's work under the title "notice to quit," and not be pleased and gratified, and also most materially assisted by their lucid subdivisions, and the full entries of most important matters under each? We fear that if Mr. Fawcett were to be estimated, either by the carefulness or by the completeness of his index, not under this head alone, but generally, and without any reference to the body of his work, he would fare very badly indeed in the public estimation, more especially if contrasted in this respect with Smith and Soden. Upon the whole, therefore, it appears that the respective authors are pretty nearly the matches of each other; probably, however,

we would be justified in saying, that Mr. Fawcett has more nearly reached his aim,—lower as it is,—than Mr. Smith and Mr. Soden have arrived at theirs. It was certainly a very arduous undertaking in these latter gentlemen to write a complete treatise upon the Law of Landlord and Tenant, which should maintain throughout the high character for excellence or merit with which it started; we should fear to do injustice to their joint production, but we almost fancy that the want of Mr. Cave is slightly sensible in certain passages towards the conclusion of their volume. At least we fancy that chapter vii., entitled “Fixtures,” is deficient, not only in originality, but in accuracy and in truth, although, compared indeed with Mr. Fawcett’s chapter on this subject, Mr. Smith and Mr. Soden are greatly more excellent than he; but then, both treatises seem to us to be both weak and vulnerable in their treatment of this subject. For instance, they have each of them adopted as their cardinal principle of division the existence or non-existence of an agreement, in clear contrariety to, if not in contradiction of, the leading decision of Lord Kenyon in *Dean v. Allalley* (3 Esp. 11;) and many subordinate decisions, which can be shown to have followed in its wake; and again, they seem neither of them to have discovered the *causa remotior*, or principle which affords the explanation of the apparent discrepancy between the two cases of *Darby v. Harris* (1 Q. B. 895) and *Hellawell v. Eastwood* (6 Exch. 295) in their bearing upon the liability or non-liability of fixtures to distress. For our own parts we think it simple folly in authors aiming at independence of treatment or of result to assert (as the authors of both these treatises assert) that fixtures are absolutely exempted from distress. We would not, however, judge the authors too harshly in this matter, which, although an important head of law in itself, can be expected to receive but a very partial treatment in a book upon the general law of landlord and tenant; it is probable, also, that both authors felt themselves as much weighted by the authority, as they have unquestionably been

lightened by the previous labours of Mr. Amos and Mr. Ferard in this branch of our law. Curiously enough they have both of them omitted altogether the case of *D'Eyncourt v. Gregory* (L. R. 3 Eq. Ca. 382) decided by Lord Romilly in 1866,—a case which may well rank, for the importance of the principle which it re-formulates and extends, with the typical case of *Lawton v. Salmon* in its bearing upon the Law of Fixtures. Probably the authors will in the next editions of their several works be able and well-minded to make the alterations we have suggested, or at all events to reconsider the correctness of their own views, where we have expressed ourselves as differing from them. Our remarks, it is unnecessary in conclusion to state, have been made in the spirit of thorough kindness and of encouragement: if as young men they have already done so well, what may they not yet accomplish when older men? We want a modern work for ourselves and our posterity, such as Coke upon Littleton has been for the generations that have preceded us; but the work of Coke was not the first effusion of a youth, any more than Rome was primæval Alba.

ART. VI.—THE TRIAL OF ALGERNON SIDNEY.

A RECENT visit to Penshurst Place has led us to collect some information respecting the life of Algernon Sidney, and to read once more the report in the State Trials of the memorable proceedings against him for High Treason which ended in his conviction and execution. It was much more natural and more easy to associate the stately old mansion, the picturesque church and churchyard, and the beautiful park and ancestral trees with the Arcadia, the Court of Queen Elizabeth, and the battle of Zutphen, than with the Discourses concerning Government, the trial in the King's Bench at Westminster, and

the scaffold on Tower Hill. But if the noble life of Sir Philip Sidney was the pervading thought in such a spot, it was impossible not to dwell also on the career and fate of his great-nephew, the illustrious martyr of English liberty, whose youth was passed at that interesting place, whose portraits still adorn the walls of Queen Elizabeth's Room and of the spacious gallery, and whose remains repose in the neighbouring church along with those of others of the Sidneys. The quiet beauty and thoroughly English character of the scenery, could not fail, if only by the force of contrast, to connect themselves with the trial of one, who, of whatever imprudence he may have been guilty, has been acknowledged by all generous minds, since that darkest period of our national history, as a patriot and a hero. They could not fail also to suggest some speculation as to the causes of the aristocratic tinge of Sidney's republicanism.

Penshurst park and manor had been bestowed by Edward VI. on Sir William Sidney, the representative of a family of French extraction whose ancestor had settled in England in the reign of Henry II., having come with the latter monarch from Anjou as his Chamberlain. To Sir William succeeded his son Sir Henry, who married Mary sister of Robert Dudley, Earl of Leicester, and was appointed Lord Justice of Ireland; his sons were Sir Philip and Sir Robert, the latter of whom succeeded to the estate and was created by James I., Viscount Lisle and afterwards Earl of Leicester. Algernon was the second son of Robert, second Earl of Leicester, the son of the first of that creation. He is supposed to have been born in 1621, and is known to have been carefully educated by his father, although it does not appear that he was sent to any public school or to a University. His first entrance on public life was in 1641, when he went to Ireland, of which kingdom his father was then Lord Lieutenant, on the breaking out of the rebellion, and commanded a troop of horse. In the campaign of that and the following year, both he and his elder brother, Lord Lisle, distinguished themselves by their gallantry. The two brothers returned to England in 1643 and joined the

Parliamentary party. Algernon received a commission as captain of a troop of horse in the Regiment of the Earl of Manchester, and was subsequently raised by Fairfax to the rank of Colonel, and placed in command of a regiment. He held various appointments of importance, and was returned for Cardiff as a member of the Long Parliament. Although Sidney acted as one of the judges at the trial of the King, he was not present when the sentence was passed, and did not sign the warrant for the execution. On the establishment of the Protectorate, he retired from public life, refusing to acknowledge the authority of Cromwell. On the restoration of the Long Parliament in 1659, Sidney again came forward, and was appointed a member of the Council of State. In the following year he was sent to Denmark to negotiate a peace between that country and Sweden, and was absent on this mission when Charles II. returned to England.

During the next seventeen years Sidney remained abroad, staying for a time at Hamburg, at Frankfort, at Rome, at the Hague, and at Paris. It was during his visit to the last place, in 1666, that he unwisely endeavoured to impress on Louis XIV. the advantage France would derive from the establishment of a republic in England, and offered to procure a rising if he were furnished with a sufficient sum of money. Although this offer was not accepted, there is little reason to doubt that at a later period Sidney and some of his associates accepted the gold of Louis to aid them in their opposition to the arbitrary government of Charles II. After this he appears to have resided in the south of France, occupied in study and watching the state of affairs in England. It is probable that during this period he was engaged in completing his work on Government, which he had begun several years before, and which he left behind him to appear in happier times. At last, in 1677, a permission for his return home was obtained from Charles II., on the plea that he anxiously desired to see his aged father before he died. When Sidney returned to England a great reaction in favour of liberal principles was

beginning, but though he was a candidate for the representation of Guildford in 1678, and for Bamber in 1679, he was defeated on both occasions. Whether it was possible for the Whigs at that time by any amount of prudence to have taken advantage of the popular feeling and restored the liberties of England, may be doubted; but at all events the excitement produced by the Popish plot soon exhausted itself, and after the Exclusion Bill was rejected by the House of Lords, when the Oxford Parliament was dissolved, the Court party were again in the ascendant, and the King was master of the situation. No fresh parliament was summoned, the charters of the Corporations were threatened, the penal laws against Protestant Nonconformists were again rigidly enforced, and the cause of constitutional liberty seemed to be entirely at an end.

In this state of matters it was only natural that the leaders of the opposition should meet together for the purpose of determining on some definite line of conduct. Shaftesbury with characteristic impetuosity at once counselled an insurrection in favour of the Duke of Monmouth, but was unable to bring the others over to his plan, and almost immediately left England. A council, however, was formed consisting of the Duke of Monmouth, Lords Essex, Howard, and Russell, Algernon Sidney, and Hampden, the son of the illustrious patriot. It is impossible to ascertain the exact purport of the meetings which took place, since the evidence of Lord Howard, on which the charge of treasonable designs mainly rested, is by no means to be relied on, and the narrative of Lord Grey of Wark can scarcely be considered more satisfactory. There can be no doubt that the subject of an insurrection was debated, but whether there was any fixed determination to carry it into effect, may be questioned. Lady Russell said, "It was no more than what her lord confessed—talk;" and there is really no trustworthy evidence to show that anything more violent than a political agitation was contemplated, although various projects may have been proposed. The truth is, that the leaders of the Whigs were at their wits' ends.

They saw that something must be done in favour of liberal government, without seeing clearly what to do. But the discovery of the Rye House plot, the work of the subordinate friends of Shaftesbury, and wholly unconnected with the design of the council of six, whatever this might be, led to the detection of the consultations of the latter. Rumsey who had been engaged in the Rye House Plot related what Shaftesbury or Lord Howard, who was accustomed to frequent his house, had told him about Russell, [Essex, Sidney, and Hampden. Russell, who having been at once warned of his danger, refused to escape, was arrested and committed to the Tower. Sidney was next arrested on the 25th June, 1683, and the papers found in his house were taken possession of by the agents of the Government.

The trial of Lord Russell, which took place at the Old Bailey on July 13, is a "memorable scene" in English history, and it is unnecessary for us at present to allude to it further. Pemberton, Chief Justice of the Common Pleas, had presided at the trial, but as the case against Sidney was weaker, it was resolved to have a stronger and surer judge to try him. The office of Chief Justice of the King's Bench had been for some time vacant. There seemed to be no man more likely to further the designs of the Government than Jeffreys, who as counsel for the prosecution had secured the conviction of Russell. Accordingly he was sworn in as Chief Justice on the 29th September, and took his seat in the King's Bench on the first day of Michaelmas Term. Lord Campbell, in his life of Jeffreys, says that the indictment against Sidney had been removed by certiorari from the Old Bailey, but there can be no doubt that the Bill was found by the Grand Jury of Middlesex on November 7, at Westminster. Sidney had been brought by *Habeas Corpus* from the Tower early in the day, and had been detained in a public-house near the Hall until the Bill was found. He was called up to plead as soon as the Grand Jury had presented the Bill. The indictment in substance charged the prisoner with compassing the death

of the King, and the overt acts laid were a conspiracy to levy war against the King, and composing and writing a traitorous libel to persuade the subjects of this land that it is lawful to stir up a rebellion against the King. Sidney desired to take some exceptions to the indictment, and to be allowed to plead over if these were disallowed, but the Court told him that this could not be done, and that he must either plead or demur. Sidney then presented a plea which had been drawn by Sergeant Rotheram, but he was informed by Withins J. that if the Attorney-General demurred to the plea, and judgment were given for the Crown, his "life was gone." The plea seems to have been prepared before the indictment had been seen, and there can be no doubt how it would have fared on demurrer. The prisoner at length pleaded not guilty, and the trial was fixed for that day fortnight. The Court refused to assign him counsel on the ground that the issue was only one of guilty or not guilty. It is impossible to discuss here the nice points of law that arise on the indictment, or to make any observations on the ruling of the Court as to the finality of a judgment on demurrer against the prisoner, and the refusal to assign counsel. It was obvious that the Court had no intention to grant anything to the prisoner *in favorem vite*.

In the interval between the arraignment and the trial, Sidney was diligently occupied in preparing for his defence. By an order of the Earl of Sunderland on the 29th October, Serjeant Rotheram, Williams and others, had been appointed his counsel, and although the court had refused to assign him counsel to assist him on his trial, he had thus the advice of several able men at the bar in supplying him with suggestions and arguments for exposing the injustice of the prosecution. He was provided with a paper of instructions and reference, drawn up by Williams for the conduct of his defence. In this paper, every point which was likely to arise is carefully noted. The illustrations used by Sidney at the trial in supporting the objections which he raised, were

probably the fruit of his own powerful intellect and great experience of affairs.

On the 21st November, Sidney was again brought to the Bar of the Court of King's Bench before Jeffreys, C.J., and Withins, Holloway and Walcot, J.J. Acting on the instructions of Williams, Sidney challenged several of the jurors as not possessing freeholds, and on various other grounds—These objections being over-ruled, he challenged peremptorily the legal number; and then a full jury having been obtained, Jeffreys addressed them as follows:—

“Gentlemen of the jury, there are some gentlemen at the
“bar, as we are informed, apt to whisper to the jury; it
“is no part of their duty; nay, it is against their duty. And
“therefore, gentlemen, if you have any of them by you that
“offer to whisper, or make comments in the cause, as you
“are upon your oaths, and I doubt not but will do your duty
“between the King and the prisoner, so I expect if you hear
“the counsel say anything, you will inform the court. Let
“us have no remarks, but a fair trial in God's name.”

According to modern notions and practice, this was no doubt an extraordinary observation for a judge to make at the beginning of an important trial; but on the whole, Jeffreys conducted himself with more decorum on this occasion than he is generally supposed to have been capable of showing—This was the first trial at which he had presided at Westminster Hall; he knew that the King had with difficulty agreed to his appointment as Chief Justice; it is probable, therefore, that for once he felt under some restraint, and although he did not conceal his anxiety to convict the prisoner, used less bluster and brow-beating than he had been accustomed to do at the Old Bailey, or afterwards indulged in, during the Bloody Assize.

The case was opened by the Attorney General, Sir Robert Sawyer, who confined himself to a general statement of the evidence which he proposed to adduce, as proving the design of raising a rebellion within the Kingdom, the presence

of the prisoner, at consultations, with this object in view, held at Mr. Hampden's house, and at that of Lord Russell, the sending an emissary by the prisoner to Scotland, to invite certain persons in that Kingdom to come to London to treat with the conspirators respecting the rebellion, and the preparation by him, of a traitorous and rebellious libel for the purpose of persuading the people of England, that it was lawful to resist the sovereign, if he had broken the trust laid upon him by the people.

The witnesses for the Crown were then examined. The evidence of West, Rumsey, and Keiling, who had all been connected with the Rye House Plot, was entirely hearsay evidence. It was intended to show that the council of six entertained the design of a general insurrection, but none of these witnesses pretended to have any knowledge of such design except from report. Anything more outrageous than this general evidence of a conspiracy can scarcely be imagined. West vouched Rumsey as his authority, and Rumsey did the same with respect to West. Sidney objected that this evidence did not affect him, and the Chief Justice said that he would tell the jury so, but when he came to sum up, he treated the evidence as brought home to the prisoner by Lord Howard, and passed over entirely its hearsay character. Sidney was peremptorily stopped by Jeffreys, when he wished to interrupt West, who was giving an account of what some one had told him that the prisoner had said, and does not seem to have made any further attempt to object to the evidence as mere hearsay. It is rather singular, that Sidney did not press this objection, as Williams had furnished him with clear instructions on the matter. There is every reason to believe, however, that the printed report of the trial was altered by Jeffreys, and it is scarcely possible to conceive that so obvious a point could have been abandoned without a struggle by a man of so resolute a character as Sidney.

Lord Howard, who was the most important witness for the Crown in proof of the alleged conspiracy, made a long state-

ment to the effect that he was present at a meeting of the council in January at the house of Hampden, Sidney being one of them, when the subject of a rising was discussed, and it was resolved before anything was done, to consider how they could coalesce with those in Scotland who might be willing to join them; and that subsequently at a meeting at Lord Russell's house in the middle of February, at which Sidney and the others were present, it was decided to send a messenger to Scotland to settle an understanding with Argyll and others who were mentioned. The witness then went on to say, that Sidney named Aaron Smith as a proper person to be sent to Scotland. Lord Howard stated that afterwards being with Sidney, the latter took out sixty guineas, and said they were to be given to Aaron Smith, and that on a subsequent occasion Sidney informed witness that Aaron Smith had been sent into Scotland. The evidence of Lord Howard was that of an accomplice, and the only thing resembling confirmation was the evidence of Sir Andrew Foster and Atterbury, who swore that they afterwards saw in London some of the Scottish gentlemen who had been named at the meeting at Lord Russell's. It is quite clear, however, that this was not a confirmation which affected Sidney, and would not in our day be considered sufficient to support the testimony of such a witness as Lord Howard. The rule of practice, however, which has prevailed in modern times of requiring confirmation of the evidence of an accomplice, did not exist in the seventeenth century, although the untrustworthiness of such evidence as that of Lord Howard must always have been obvious. At the subsequent trial of Hampden, who was indicted for a misdemeanor instead of for treason, Lord Howard was also the principal witness for the Crown, and Williams, who was counsel for the defendant, showed in a very powerful manner how little the evidence of such a witness was to be relied on.

It was necessary by the statutes of Edward VI. relating to this matter, that there should be two witnesses to prove the treason, and Lord Howard was the only witness hitherto

called whose evidence, such as it was, brought home to the prisoner the conspiracy to levy war. Even Jeffreys, reckless and audacious as he was, could not have ventured to direct the jury that the evidence against Sidney up to this point was such as the law required. In Lord Russell's case, in addition to the evidence of Lord Howard, Rumsey and Sheppard had sworn to what took place at a meeting held in the house of the latter at which Lord Russell was present. Their evidence, indeed, was worthless, but it had been sufficient to convict the illustrious prisoner. Neither Hampden nor Sidney, however, had been present at that meeting. In the case of Hampden, it was found necessary to indict him only for a misdemeanor, as there was no other evidence against him to prove an overt act except that of Lord Howard. But in Sidney's case the writings found in his closet were taken to form an overt act of treason, and witnesses were now called to prove that these papers were in the handwriting of the prisoner. Sheppard who had seen the prisoner write the endorsement on several bills of exchange said that he believed the paper to have been written by him. Cary, the second witness, said he had not seen the prisoner write more than once, but that he had seen his indorsement upon bills, and that the handwriting of the paper was very like it. Cooke, another witness, said he had seen several notes, which had come to him with the indorsement of the prisoner's name, and that he had paid them, and had never been called to account for mispayment. The prisoner had objected to this evidence as inadmissible against him, but the whole of it had been received. Now there can be no doubt whatever that the evidence of the first two witnesses, according to modern doctrine, was legal evidence to prove the handwriting. What weight ought to have been attached to it when the question was not as to a mere signature, but as to the handwriting of a long paper, is another question. The Act for reversing the attainder of Sidney, passed after the Revolution, recites among other particulars that "there

“ had not been sufficient legal evidence of any treason
“ committed by him, there being produced a paper, found
“ in his closet, supposed to be his handwriting, which was
“ not proved by any one witness to have been written by
“ him, but the jury was directed to believe it by comparing
“ it with other writings of his.” The apparent inconsistency
between the language of this recital and the report of the
trial has been frequently pointed out. Lord Denman in
Doe v. Suckermore, 5 A. & E. 746, speaking of the charge
against Jeffreys of having falsified the report says:—“ None
“ of the numerous pamphlets, however, impute to the report
“ any misrepresentation in the matter of law. On the other
“ hand, when the Act for reversing Sidney’s attainder passed,
“ the memory was green of the atrocious trial which pro-
“ duced it, and the foulness of the admitted proceedings
“ rendered all exaggerations or misstatement superfluous.”

In a learned note to the above case, 5 A & E 753, the follow-
ing remark occurs. “ It seems probable that the objection
“ pointed at by the Act of Reversal was considered by all
“ parties as applying, not to the process by which the similitude
“ of handwriting was ascertained, but to the practice of allow-
“ ing that similitude to go to the jury at all as proof in a criminal
“ case, unless as an adjunct to other evidence upon the point
“ to which it was adduced, mere opinion of handwriting,
“ however formed, being thought by the objecting party, too
“ slight a testimony to countervail the ordinary presumption
“ in favour of innocence.” Various authorities are referred to
in support of this view, and we think on the whole it explains
in a satisfactory manner the language used in the Act of
Reversal. Assuming the report of the trial as to the evidence
to prove the handwriting of Sidney to be correct, there was no
comparison of handwriting in the modern sense of the term.
But it is quite probable that this term then comprehended all
evidence of handwriting where the witness swore to his belief,
from the usual sources of knowledge in such cases, without
having seen the document actually written by the person to

whom it was sought to be brought home. The expression used by Sidney himself when objecting to the evidence is "similitude of hands," which strongly supports this view.

But whatever may have been the rule, with reference to the proof of handwriting in criminal cases at that time, the real objection, according to present views, would certainly be, that the paper itself furnished no evidence against the prisoner, with reference to the charge on which he was tried. It was a mere discussion on an abstract question concerning Government, being a criticism on Sir Robert Filmer's absurd treatise which carried back to the first man, in order of promogeniture, the absolute right of Kings over their subjects. The writer of the paper, as Locke afterwards did, vindicated the right of subjects to resist a sovereign who had betrayed the trust committed to him, but there was not one word with reference to any design against the Government of Charles II. This was well put by Sidney when he said—"They have proved a paper found in my study of Caligula and Nero,—that is compassing the death of the King, is it?" Even when Lord Howard was recalled after the paper had been read, upon his being asked by the Attorney General, whether there were in the debates at the meetings any reflections upon the King, that he had broken his duty, the witness was obliged to say that he did not remember. The evidence, therefore, on the part of the Crown, to connect the paper with the treason charged in the indictment entirely failed. The true view of the law on this subject, is stated by Mr. Justice Foster, in his Discourse of High Treason. "How far words or writings of a seditious nature may be considered overt acts under this branch of the statute [that relating to compassing the death of the King] hath been the subject of several debates. In Mr. Sidney's case it was said *scribere est agere*. This is undoubtedly true under proper limitations, but it was not applicable to his case. Writing, being a deliberate act and capable of satisfactory proof, may, under some circumstances with publication, be an overt act of treason. And I freely

“admit, that had the papers found in Mr. Sidney’s closet been plainly relative to the other treasons *charged in the indictment*, “they might have been read in evidence against him.” Foster’s Reports 198.

The record of the conviction of Lord Russell was then put in, though this was clearly not evidence against the prisoner on the indictment. When in Hampden’s trial the Attorney General proposed putting in the record of Sidney’s conviction, Williams objected to it as not evidence, and it was withdrawn. Sidney after this stated his objections in point of law to the evidence that had been brought forward by the Crown. He objected, in substance, that conspiracy to levy war, was not treason, within the 25 Ed. III., that there were not two witnesses to prove one overt act, that similitude of handwriting was not evidence of his having written the paper, and that the paper itself had no reference to any conspiracy, but was a mere polemical discourse. It was when speaking to the second point, that Sidney brought forward the celebrated case of Susanna and the elders, which is still sometimes used effectively in defences. On the last point, referring to Filmer’s work, he said with great force and truth, “Cromwell, when “one White, a priest, wrote a book wherein he undertook to “prove that possession was the only right to power, though he “was a tyrant, and a violent one (you need not wonder I call “him tyrant, I did so every day in his life, and acted against “him too,) it would be so odious a principle, he would not “endure it, and he used him very slightly for it—Now this “Filmer, that no man must write against, is the man that does “assert it, that it is no matter how they came by their power, “and gives the same power to the worst usurpers, as they that “have rightly come to the crown—By the same argument, “if the arrantest rascal of Israel had killed Moses, David, “&c., and seized upon the power, he had been possessed of “that power, and been father of the people. If this be doctrine, my Lord, that is just and good, then I confess it may “be dangerous for anything to be found in a man’s house, con-

“trary to it, but if a commoner of England write his present thoughts, and another man looking on his work writes his present thoughts of it, what great hurt is their in it?”

Sidney then called as witnesses Lord Anglesey, Lord Clare and others, to invalidate the credibility of Lord Howard, by showing that he had made statements to them contradictory to, or inconsistent with, the evidence he had given in court, and to prove him to be interested and biassed. Sidney then addressed the jury in an able and masterly speech, but without going minutely into the facts. He exposed, however, with much force the unsatisfactory character of Lord Howard's evidence. The witness had stated that he had gone first into the country and then to Bath, after Smith had been sent to Scotland. Sidney observed, “Mr. Attorney says the plot was broken to the Scots, (God knows we were neither broken nor joined), and that the Campbells came to town about that time I was taken; and in the meantime my Lord Howard, the great contriver of all this plot, who was most active and advised the business that consisted of so much *finesse*, he goes there and agrees of nothing, and then goes into Essex upon great important business, greater than the war of England and Scotland,—to what purpose? To look after a little pipping manor,—and what then? Why then it must be laid aside, and he must be idle five weeks at the Bath, and there is no enquiring after it. Now I desire your Lordship to consider whether there be a possibility for any men, that have the sense of porters and grooms, to do such things as he would put upon us.”

The Solicitor General, Heneage Finch, replied, and the Chief Justice summed up. Jeffreys laid down the law correctly as to a conspiracy to levy war being an overt act admissible to prove the compassing of the King's death, and as to the sufficiency of two witnesses who proved two several overt acts separately. With respect to the proof of handwriting, what he states is certainly correct according to modern notions; but was, it must be supposed, wrong

according to the views which then prevailed. But he was clearly wrong in directing the jury that the paper which had been produced in evidence against Sidney, was an overt act of treason. The remarks which he made on the paper itself, although not in the style of which he was capable, could only proceed from a judge who was resolved to give no quarter to the prisoner. We have already mentioned the manner in which he treated the evidence of West and Rumsey as bearing against Sidney. But the most astounding thing he said was perhaps the following:—"Next I must tell you, gentlemen, upon, I think, a less testimony, an indictment was preferred against the late Lord Russell, and he was thereupon convicted and executed, of which they have brought the record."

The jury retired to consider their verdict. Jeffreys, it is said left the Court under pretence of taking some refreshments, but in reality saw the jury in private and gave them more particular instructions, the tenor of which may be too readily divined. In half an hour the jury returned and brought in a verdict of guilty. The whole time occupied by the trial was from ten in the morning till six in the evening. This was indeed "justice speedily, without delay." In our own day the tendency may perhaps be to lengthen trials unnecessarily. But it was well observed by Sidney when at the conclusion of the address of the Solicitor General, he wished to offer some remarks, and was stopped by Jeffreys, "My Lord, it was a wise man said there never could be too much delay when the life of a man is in question." Sidney was brought up for judgment on the 26th of November. When asked by the officer of the Court, why judgment should not be given against him and execution awarded according to law, he raised various objections to the legality of his trial, to the indictment, and to the evidence. But it was all in vain. Sentence in the usual form in cases of High Treason was pronounced by the Chief Justice. Sidney received the sentence with a noble protest against its injustice.

On the 7th December, Sidney was beheaded on Tower Hill. The rest of his sentence was remitted on account of his family. The bold and heroic manner in which he met his doom was illustrative of his character] and his convictions. Professor Smyth in his Lectures on Modern History, eloquently observes:—"Sidney marched to the scaffold as to "a victory, displaying at his execution, as on his trial, all the "bold and sublime traits of the republican character. The "steady step, the serene eye, the untroubled pulse, the "unabated resolve, 'the unconquerable mind and freedom's "holy flame; 'the memory that still lingered with delight on "the good old cause, as he termed it, for which he was to shed "his blood; the imagination, that even in the moment of "death, disdainful alike of the Government, its judges, its "indictments, and its executioners, soared away to some loftier "code of justice, and hung enamoured on its own more "splendid visions of equality and freedom." Vol. II. p. 31. Professor Smyth contrasts the heroic end of Sidney, with the last moments of Lord Russell—"the husband with whom "the bitterness of death was past, when the partner of his "bosom had looked her last farewell; the patriot who was "filled with no images of liberty drawn from the imperfect "models of Greece or Rome, but intent on a monarchy restrained "by popular freedom, and on popular freedom civilized by a "monarchy." We confess our sympathy with the latter rather than the former, although perhaps John Hampden would be with us the great model of an English patriot. But we willingly acknowledge the service which the lovers of freedom in the abstract have done to the good cause in this country, whilst we must ascribe our progress in government and law mainly to the moderation and the prudence of the supporters of constitutional liberty.

In our account of the trial of Sidney we have been obliged to pass over many interesting and important matters connected with it. The report itself and the documents relating to it would furnish materials for a volume. But any account

of it, however imperfect, will not be without value, if it only shows how justice may be perverted in evil times. The evidence against Sidney would have merely warranted, as in the case of the younger Hampden, an indictment for a misdemeanor, and even then it is doubtful whether it was evidence which ought to have led to a conviction. In the quotation we have made above from Lord Denman, we have seen the impression produced on the mind of that great judge and sound-hearted Englishman by the trial of Sidney. We shall conclude by quoting what Erskine said of it and the other state trials of the same period, the records of which, by the Acts for reversing the different attainders, passed after the Revolution, were ordered to be taken off the file and obliterated—Referring to this in his great speech in defence of Hardy, he says, “The order was dictated, no doubt, by a pious tenderness for national honour, and meant as a charitable covering for the crimes of our fathers. But it was a sin against posterity; it was treason against society; for instead of ordering them to be burnt, they should have directed them to be blazoned in large letters, upon the walls of our Courts of Justice, that, like the characters deciphered by the Prophet of God to the Eastern tyrant, they might enlarge and blacken in your sight, to terrify you from acts of injustice.” This is no doubt expressed in a somewhat rhetorical and impassioned manner, but it conveys an important lesson. Much as posterity may feel ashamed of such trials as those of Russell and Sidney, it is unwise to consign them to oblivion. They can only be referred to, indeed, to be held up as warnings; warnings against injustice can never be without use as long as men continue to be imperfect and fallible beings.

ART. VII.—BANKRUPTCY BUSINESS.

ON March 5th, 1869, the Attorney-General moved for leave to bring in his "Bill for consolidating and amending the Law of Bankruptcy," in a short and pleasant speech, showing that its main points were to be brevity, simplicity, and likeness to the Scotch law. His agreeable sketch was very well received, especially so by the mercantile community. Most people of every class praised it, and even those who knew nothing of the Scotch law, hearing that its main object was to throw the debtor into the hands of his creditors, said that we had at last found out the true principle of bankruptcy legislation, and unanimously applauded. The Bill went on very comfortably amidst a chorus of content. In the House of Lords there was only a little friendly talk, and everybody wished it well. Lord Cairns, indeed, said that the novel terms introduced into our law might lead to difficulty and confusion, but it was answered that they made it so simple to the mercantile mind. He also pointed out that its brevity came from leaving out nearly everything that draftsmen had generally put in a Bill of such importance; but he was answered again that the rules to come would settle everything clearly, and fill up the vague sketch. Lord Westbury seeing what was at least an imitation of his own favourite chief judge scheme, expressed satisfaction, and Lord Chelmsford said a few courteous words of compliment.

Then the Bill came out as an Act, clearly printed on toned paper, with fancy titles to the various "parts," and reading like a novel. It sold largely; it was most favourably reviewed by the press, and ran through several editions, being, at one time, out of print. Business men of all classes got it as they would a well-written pamphlet that had made

a sensation. Then they studied its few and simple provisions, remembered that everything else was repealed, and were fully persuaded that the time had at last come when universal knowledge of the law would be something more than a legal fiction. Here was a novelty, indeed, a complete code of bankruptcy, without any technical language to confuse them, all in 133 neat and simple sections. Truly it was, as Lord Cairns had said, a pleasant thing to hear of such a Bankruptcy Act. Some doubting readers noticed that the word "prescribed" did occur rather often, but then they remembered that the proceedings and matters of form only were to be settled by the Rules. Nobody noticed a few lawyers, who observed that the Act by itself contained hardly a single clear and complete provision, and that some parts, such as s. 126, for instance, seemed like loose notes of some plan that the framer may have had in his own mind at the time, but which nobody else could understand. Such as these waited anxiously for the Rules before they tried to make out what the new bankruptcy law would be; but the majority of people looked forward to the promised publication, as to the sequel of an entertaining work of fiction, that might have been entitled, "*The Creditor's Creed; or, The Debtor's Downfall.*"

On January 1 the Rules appeared just in time to put the life of steam into the ill-jointed machine that could never have acted without them. They were found to be 319 in number, and made a pretty thick volume of solid type, not got up half so attractively as the act, without marginal notes, index, or contents; in short, evidently intended to be used only by those who would be obliged to know something about the new law. Mercantile men looked at them amazed, wondered at their number, wandered up and down their crowded pages, found no guide or finger-post anywhere, lost themselves in looking for some oasis where their mind should have a chance, read a few lines and thought them dry and tedious, and soon decided that, like all sequels, this blue

volume was not nearly such interesting reading as the toned pages of the Act, so that the mercantile men began to doubt whether bankruptcy had been reduced to such a very simple and business-like matter after all, and whether even this branch of the law did not still remain to them an art and a mystery. The profession, too, were astonished at the new Rules, and found their careful study of the Act itself was of little or, no avail. For the so-called rules were, in fact, another Statute very different from the former loosely-written but popular measure, repeating much under an improved form, and framed by practical lawyers for actual use.

The admiration of the mercantile community for the present Act, before it began to work is, however, nothing at all unusual. Upon a careful study of *Hansard* we have found that the same thing has happened on the introduction of every novelty in bankruptcy legislation. On each occasion, in the past, where the Government introduced their consolidation or amendment, has some mercantile member of the House stood up, as soon as possible, and congratulating everybody and himself upon the fresh attempt, declared that it met with the complete approval of commercial men. With regard to the present Act this approval was, perhaps, stronger than ever, springing as such approbation usually does, from the badness of the Statute that was being repealed. But the glorious expectations that were formed about the last law of bankruptcy have, to our thinking, been even now disappointed in many respects, and are destined, unless something more is done, to be entirely mistaken. We will endeavour to show how this has come to pass, and also to point out where the new law has failed in its practical working.

Now, the mercantile community are more interested in the question of bankruptcy than are even lawyers, and therefore they very naturally think they know best what is good for their own interests. So when they were told by the Attorney-General, in introducing his Bill, that, "the man " who held it in his hand would have all the information

“that was necessary without going back to previous Statutes,” they believed him, apparently, to the very letter. This belief was supported by the Lord Chancellor, who stated that, “owing to the ability of the able draftsman who drew “it up, the Bill contained only 130 clauses, and coupling it “with the Abolition of Imprisonment for Debt Bill and the “Repealing Bill, the whole of this new Bankruptcy Code comprises only 180 clauses.” Now, the Lord Chancellor must have known when he said this that many other Statutes referred to various important parts of the Bill; that some hundreds of decided cases would have to be considered in construing its provisions, and that he was himself going to settle about 300 rules that were absolutely necessary for its practical working, and of, at least, equal importance with the Act itself. He knew this as a lawyer, but he forgot it as the head of his party in the House of Lords. The simplicity of the new measure was made much of, and for what reason, but to make it pass? We think this “simplicity” has been proved a delusion, and the two large works that have already come out upon the Act, two very thick volumes, with lists of cases, and bulky appendices, and much learned writing, bristling with technicalities, must have quite convinced every one that bankruptcy law is no shorter nor simpler than before, but only newer in some parts, and so more troublesome to learn and understand.

Then with regard to their own management of such affairs, the Lord Chancellor addressed mercantile men when he concluded his speech of the 8th July, with these words. “We “proceed on the principle of saying to the creditors, ‘Take “the whole thing into your own hands. We enable you “to put in motion a machinery by which you may realise “assets for yourselves. More than that the Legislature cannot do.” Again, if we look only to the “sweet simplicity” of the Act, these words seem fair and reasonable, but taking the rules into consideration they are utterly fallacious. In these are so many questions of practice, of time, of form,

that even in attending a meeting of creditors, many men of business take a solicitor with them, or send one as a representative, that some one with the requisite technical knowledge may be there to look after their interests. Then as to "realising the assets," an ordinary man of business can hardly move a step in disposing of the estate to which he has been made trustee without some legal guide to keep him clear of the hidden rocks and quicksands, which are not mentioned in the new "Code of Bankruptcy Law." We do not hesitate to say that the present practice of liquidations is more complicated and full of detail than any other of a like kind that came before. Take the question of majorities, for instance, how many ordinary men out of the profession, or even in the profession, understand the various majorities and know the differences between them?

All this expectation and consequent disappointment, this confusion and uncertainty arises from the fault of commercial men themselves, for it was by their great influence that the present curious kind of legislation was brought about. They are indeed quite right in pressing for a reform of a bad law, for lawyers of their own accord would do very little in that direction, but they are wrong in thinking that they know the lawyer's business better than he does himself. If they would but decide upon some principle and leave the working details to those who understand them and can foresee their effect, the question of Bankruptcy Law would have been decided long ago. But their representatives in the House of Commons will let nothing alone, they will pry into every little point of practice and procedure, though they know really nothing about it. The result of this is that a Government has to turn what should be a work of combined science and actual experience, into a popular measure that shall please their supporters and read well. Bankruptcy Bills of the true nature have been drawn by Lord Westbury and by Lord Cairns, but they could never get passed under the present system, for amateur lawyers must question every

clause, and by some clumsy alteration of a delicate and artistic machinery spoil the whole, and prevent its doing satisfactory work. The time taken up by these proceedings prevents us having a real Bankruptcy Code. This explains the shortness of the last Act, for as the Attorney-General said, it would be hopeless to pass a Bill of 600 sections. The only way therefore, in which anything like a law could be got was to pass a third of the whole composed of pleasing sketches of some of the more important points drawn to attract the public, and by leaving the other two thirds to be done by lawyers, keep them from the meddling of amateur amenders, and ensure the larger portion of the measure being fit to work. Lord Cairns said of the Bill at the first, "It is rather a Bill to empower the Lord Chancellor and the chief judge to make a Bankruptcy Bill," and looking at the Rules and Act together, no one can deny that this statement is most accurate. Such a mode of legislation seems to us very dangerous and to have many evil effects. In the first place it encourages the idea which Parliament has already too much countenanced, of shirking its legal and proper work. For the office of Parliament is legislation, and to pass an Act in fact authorising another Act to be made, containing provisions that were never contemplated is not legislation. There is a vague thing in this country called Public Opinion, which has far too great an influence in affairs which it knows but little about, and which is in a fair way to degenerate into a kind of mob-rule. For the only exponents of Public Opinion are the leading articles of newspapers, written by men who will write of anything, who have but a superficial knowledge of every thing and whose aim is not sound laws, or scientific measures of legislation but the popularity of the hour.

Another evil effect of leaving an Act of Parliament to be made a working law of after it is passed is, that there must always be some inconsistency, confusion, and incoherence between the Act itself and the Rules that are to be

read with, and as a part of it. Of course, if the Statute contained everything but the actual regulations and procedure, there would be nothing but good in leaving these to be settled afterwards by those whose business it will be to administer the law. But this was not the case here as we shall presently show, for there are in the Rules about as many provisions of actual law as in the Act. Lord Cairns said in the House of Lords, "I doubt whether this Bill may not carry that principle to an extreme length," and probably when he saw the rules his doubt was confirmed and made a conviction. When the Act is framed by one man and the Rules by others, how can there be any unity of design in the whole? Between the two, in this case, there is a great difference of intention, of aim, and even of principle. But the greatest evil that arises from this way of making laws is, that after the Statute is passed people can never tell what the law will be. This makes an absurdity of the theory which supposes all legislation to be made with the consent of those who must obey it. Such a proceeding cannot but cause great dissatisfaction, and it is to this source that we trace whatever produces annoyance in the working of the present Bankruptcy Act. For it has not turned out what was expected, and though this would be no cause of complaint if the grievances had been even shadowed forth in the Bill; yet when they spring up afterwards, out of the rules and regulations, we may justly raise our voice against them. The two main points that are now found fault with in the working of the new bankruptcy law are, the little done by the chief judge, and the practical removal of the court from the city, with the consequent confusion of business.

As to the chief judge, from the way the Attorney-General spoke of him and his duties, though it was very vague, as indeed was everything else, most people were led to think that he would be something like Lord Westbury's famous idea in theory and practice. This idea was to have a judge who should in fact be chief of his court, who should be always

there, who should sit in chambers to hear ordinary applications, and in open court for higher purposes, and, in fine, who should give his whole time and attention to the important business of his office. The present Act undoubtedly did not go so far as this excellent and well considered plan, for by s. 61 it provided that the chief judge should be a judge at Common Law or Equity, and should sit in bankruptcy, besides his other duties. Yet one could not but remember that the Attorney-General had said that he put much hope in the chief judge, and considered him as "the keystone of the arch." Besides this, s. 65 provides that the chief judge "may sit in chambers." Taken altogether therefore, it was but fair to expect that the chief judge would preside at least the greater part of his time in the Court of Bankruptcy, and would, by his presence and influence, give a tone and dignity to this branch of the law, which it had so long needed.

For a short time after the new law came into operation this was so, and every expectation was fulfilled. The Government had chosen a sound and careful lawyer, a man of high reputation, and the profession were loud in praise of his appointment. Sir James Bacon sat down in his court and acted as its chief in all respects most worthily, doing all he could to form the practice in bankruptcy, and giving his judgments with that learning and painstaking care which are his chief attributes; and though at the beginning there was little to do compared with what there is now, no appeals having yet come, still he found enough to do, and fully occupied his time in a most important and necessary work.

But when a vacancy occurred in a Vice-Chancellorship the Government carried out their mistaken scheme of economy, and appointed Sir James Bacon. Certainly he was a most fit judge for the Equity Court, but the consequences of taking the vital principle away from bankruptcy business began to be felt at once, and they are every day becoming more serious and the cause of still louder complaint. The Courts of

Chancery are crowded with business, and each Vice-Chancellor has more than he can do. Sir James Bacon found that he could spare but little time for his bankruptcy duties without throwing the business of Chancery into confusion, and that even that little causes delay and difficulty to suitors. He, therefore, was obliged to delegate his powers to the registrars, and to sit in the Bankruptcy Court but once a week on Mondays, to hear appeals from the County Courts and any cases that might be reserved for his decision.

By s. 67 the chief judge may delegate to his registrars such powers "*as it may be expedient.*" These words are certainly loose and vague, but still it is stretching them farther than their ordinary meaning, to delegate to the registrars all his powers, with a single exception of commitment for contempt. Appeals from local courts being "to the chief judge in bankruptcy," he could not delegate them. However it was a necessity of his position, he could not be in two places at once, and so without any fault of his this power had to be exercised, perhaps, even beyond its fair meaning; for, though it was necessary, it may be doubted whether it can be called "*expedient.*" The result of this is most unsatisfactory. The registrars are men of standing and ability, but they had been long accustomed to do the administrative work of the old Act, and thus came with little experience to the judicial work of the new one. They are placed in an awkward position as sitting in the name of the chief judge, they are expected to do as well as he, and thus suffer from an unfair comparison. They are, moreover, often compelled to refuse applications that matters of importance should be referred to the chief judge, as he is already over-burdened with work for his one day a week, and the appeals from local courts are months in arrear. Then, from the very nature of their authority, there can be no appeal from them to the chief judge, but parties must bear the expense and delay of taking cases up to the Lords Justices. Thus, everything is unsatisfactory both to the registrars and the suitors, their decisions continually cause complaint, and swell the list in the Court of Chancery Appeals already overflowing.

With regard to removing the greater part of the business from Basinghall Street, the position is even more vexatious and absurd, and affords perhaps stronger ground of complaint by the profession and city men. During the passage of the Act through Parliament not one word was said about this change, nor did any clause of the Bill contain a hint of the court in Portugal Street. For these reasons every one naturally thought things were to go on as usual, and, had any idea to the contrary been mooted, it would have met with considerable opposition from many quarters. Surely then it was far from fair, for the Government, having passed their Bill on this tacit understanding, to turn round afterwards and move a part of the bankruptcy business into quite a different district of the town. At the time when the Bankruptcy Court was first established in the city every one was satisfied that it was in its proper place, and since then until now there has been no thought of alteration. What reason is there given for the present change? None. It was moreover carried out against the wishes and convictions of city solicitors and city men, as expressed in an address presented to the chief judge by a deputation headed by the late well-known and highly respected Mr. Lawrence.

But the mere change is not the whole evil and inconvenience of the present system, for there is the absurd manner of the change to be considered. If the Government had shut up the court in Basinghall Street, and sold its site to raise money wherewith to buy some gunpowder, there would at least have been reason in the change. But they have done nothing of the sort, notwithstanding their first Gospel of Economy, but, on the contrary, they have spent money, though not much, in opening a long unused court, and probably increased the working expenses by having two courts instead of one to maintain. With regard to the present practice in bankruptcy all that the average practitioner knows for certain is that the chief judge never comes into the city, and that therefore he, or his repre-

sentatives will be found at Lincoln's Inn. But as to everything else, all is uncertainty. The registrars seem hardly to know where they will pass the day, and we believe their habit is very often to spend all the morning at Portugal Street, and then stroll down to the city of an afternoon. As to the officials they are indeed comets in a mist, knowing not whither they may find themselves going, but certain of not being stationary for long. Documents when required must be hunted for with perseverance, and after a refreshing chase from the city to Lincoln's Inn and back, may be at last brought to bay in Quality Court. For here is another corner, and a dark winding corner too, of that eccentric tribunal called the London Bankruptcy Court.

Now the annoyance, delay, and expense caused by all this confusion are serious matters to those concerned in bankruptcy business, and some steps should be taken by way of a remedy. If we cannot go back to the old state of things, let us at least have everything moved to Portugal Street. If this is too much, surely some arrangements could be made and published by means of which those who wish may know where, out of all these places, they are to go for each particular branch of their work. If even this is beyond trying for, then, at least, we may hope that the officials themselves will find out, where they are, what they are doing, and at what place their own work is to be done; so that they may be able to guide unfortunate men who have bankruptcy business to do through this bewildering maze of courts and jurisdiction, which is at present totally without a plan. In conclusion, we cannot help observing that both the great sources of trouble, delay, and vexation here commented upon, would not have come to pass had the Act contained what was really going to be the law, or had its supporters had any idea of its results before they happened, for what they oppose now they could with more effect have opposed then.

ART. VIII.—CLASSIFICATION OF RIGHTS
IN THE INSTITUTES OF GAIUS AND JUSTINIAN;
A CRITIQUE.

THE example of codification set by the law reformers of India cannot long remain unfelt in England. So huge and unwieldy is the law, so multifarious and complicated in detail, that, with its widely scattered authorities and diverse jurisdictions, no human brain can command it. Hence a growing desire is expressed for some purification of the law-sources, and some method and order in the arrangement of its fragments. Before any practical steps are taken towards the accomplishment of so valuable and necessary a reform, much discussion will arise as to the form in which the law should be codified. One side light that may be thrown on this topic is to be found in the practice of the Institutional Writers of Rome. Apart, indeed, from the lessons to be drawn from their experience, a special value attaches to their work, inasmuch as it has been for succeeding systems a model, which, even when not slavishly followed, has exercised a profound influence.

In our present inquiry, scarcely any help can be obtained from the great compilations of Roman Law—the Digest and Code of Justinian. That work is a monument of industry, but it has no pretensions, so far as its arrangement is concerned, to lasting or scientific value. The aim of the distinguished jurists, who surrounded and adorned the Court of Justinian, was restricted; it was hardly more than to purify the authorities—mechanically to separate what was law from what was not law. This was highly useful to the legal practitioner: instead of having to ransack a whole library, he had only to deal with two books of comprehensible dimensions.

The internal arrangement was based on tradition and accident. The leading divisions into titles were arranged so as to follow each other in the order in which the same topics had been taken up in the *Edictum Perpetuum*. This was an order to which the lawyers were thoroughly accustomed, and for that reason it was adopted by Justinian for his Digest. Even in the arrangement of the fragments contained in each title, there was displayed the most perfect disregard of scientific considerations. Three committees were charged with the work, each taking up a different source of law ; and the contribution of each to a title was arranged pretty much according to its length, the longest being taken first. So far, then, as the *corpus juris* goes, there is nothing that can be of material value in the preparation of a code of law.

In the Institutes of Gaius, however,—and again, in the Institutes of Justinian,—an honest, and by no means unsuccessful, attempt is made to classify the various topics of law. The arrangement, although not faultless, has distinct merits, and has at all events thrown a spell over modern jurists. The Institutes of Justinian must be taken along with the Institutes of Gaius, of which, indeed, it is no more than a revised edition, with such additions and omissions as were necessitated by the changes in the law during a period of about three and a half centuries. It must be premised that, with a trivial exception, both Institutes deal only with private, as opposed to public, law. They expound the law as between subject and subject, not as between sovereign and subject. The corresponding part of our law would be, generally speaking, that part only in which the Crown does not appear as a party. The question to be considered now is, what are the leading ideas to be gathered from the Institutes on the subject of classification, and what is their value with reference to a code of modern law ?

The authors of the Institutes draw pointed attention to what they consider their leading divisions—the well-known tripartite arrangement of the *jus de personis, de rebus, and de actionibus*. In modern parlance, it is the Law of Persons, the

Law of Things, and Civil Procedure.* The last department of "actions" or procedure is easily distinguished, but an insuperable difficulty has been found in fixing the difference between the law relating to persons and the law relating to things. Law concerning *things* naturally suggests the subject of property. That is one, but by no means the sole, department included under the comprehensive designation *things*. "Things" are said to be corporeal or incorporeal. Corporeal things are intelligible, but what are incorporeal things? They are defined as things "*quæ in jure consistunt*," and the examples given are *hereditas, usufructus, usus, obligatio*. But these are simply rights, and not the objects to which rights attach, and which is the usual signification of "things." By aid of this elastic phraseology, the law of property, the law of inheritance, the law of contracts, and the law of torts or wrongs, are co-ordinated as departments of the law concerning "things." So much being swallowed up by the law of "things," the wonder is that anything should have been left for the law of persons. The rights included in the *jus de personis*, to take a single example, the paternal power, were surely creatures of the law (*quæ in jure consistunt*), and therefore the law concerning persons must not be opposed to, but must be included in, the law concerning things. Consistency permits no other course. Either the *jus de rebus* is too wide, and should be relieved from the law of obligation, or it is too narrow, and should include the subject of *status*. Moreover, the words "persons" and "things," as descriptive of distinct classes, are singularly inapt; for, as Mr. Austin justly observes, "All law is of or concerning persons, and most law of or concerning things."

Since the language of the Institutional Writers does not

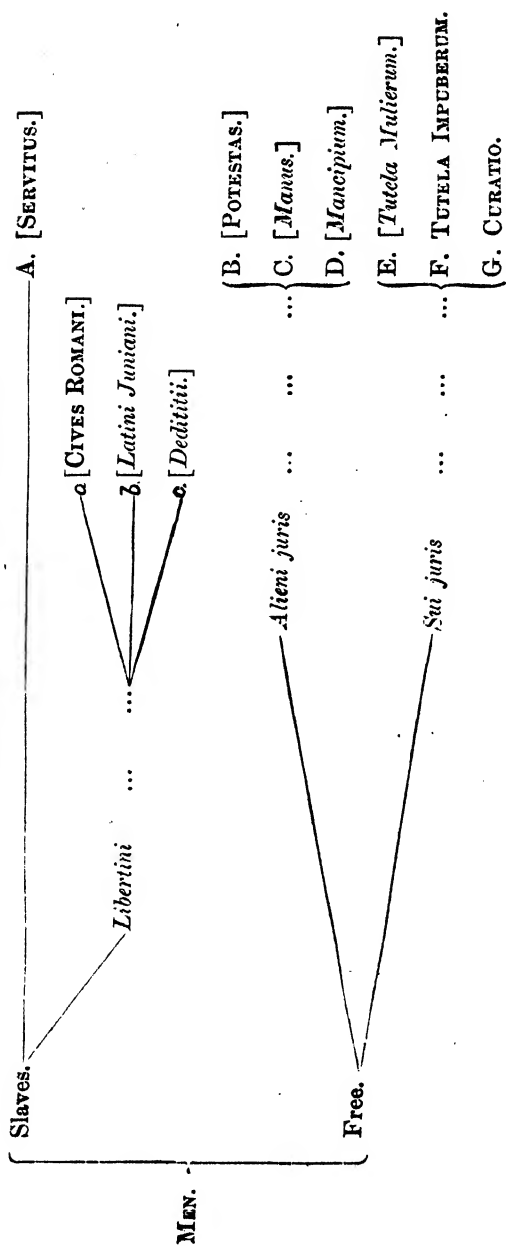
* Savigny compares this threefold arrangement with other triplets: *vi, clam, precario*; the three forms of authority over free persons, *potestas, manus, mancipium*: the three *capitis diminutiones*; and the classes of *cives, Latini, Peregrini*. He observes that the "*Res Quotidianæ*" of Gaius, and the "*Institutes of Florentinus*," had not the tripartite division, and he conjectures that it is a fancy of Gaius's.

reveal any clear principle of division, there remains another source of information—to seek in the subject matter of the different groups, for the guiding principle of arrangement. It is advisable to begin with the law concerning persons, because it is homogeneous and short. If the meaning of the *jus de personis* is made out, the *jus de rebus* will at once be understood. The classes dealt with under the law of persons are slaves, children under the *patria potestas*, wives *in manu*, children under guardians, and adults under curators. The table opposite will explain the detail.*

The classes marked A, B, C, D, are the actual classes as created by law; so are those marked a, b, c. They are the species that the jurist may sum up into *genera* if he pleases, but they are not made by him; they are made for him, and he must deal with them as they come to his hand. Those classes (such as *b, c, C, D*) that are printed in Italics were in existence in the time of Gaius, or were described by him, but were perfectly obsolete in the time of Justinian. The classes, and they form nearly the whole, printed in brackets, correspond with nothing in modern law. Slavery, for example, is abolished, and the *potestas* and *manus* survive in an exceedingly attenuated form.

The question now is, upon what principle are those classes selected as constituents of the *jus de personis*, and why are other classes, such as magistrates, aliens, bankrupts, mortgagees excluded? Many and diverse are the answers that have been given. Three are especially worthy of attentive study—those by M. Blondeau, Austin, and Savigny. It will be convenient to take the answer of Mr. Austin first. That distinguished jurist has brought to the examination of the subject the well-known subtlety and acuteness of his mind, but without altogether satisfying himself. He observes that “the law of persons is the law of *status* or conditions, detached *for the sake of convenience* from the body of the entire legal system.” His analysis of *status* deserves to be quoted:—

CLASSIFICATION OF PERSONS.



“ On the whole, then, the marks of a *status* or condition are these : —First, it resides in a person as a member of a *class*. Secondly, the rights and duties, capacities and incapacities composing the *status* or condition, regard or interest specially the members of that class. Thirdly, their rights and duties, capacities and incapacities, are so considerable in number, that they give a conspicuous character to the individual, or extensively influence his relations with other members of society. This last property is, I think, not essential ; and would not be regarded in a body of law rationally constructed.”

This account of Mr. Austin's is not so much incorrect as inadequate. What he tells us is quite true, but it does not seem to exhaust the meaning of *status*. He asks, “ Why, for instance, should not *heir*, or *executor*, or *administrator* be a *status* as well as husband and wife ? ” and he answers perhaps for the purpose of commodious distinction. Under *status* he also includes aliens, magistrates, and hired servants as well as slaves. At present it would be premature to examine whether, in a sound jurisprudence, those classes ought to be embraced by *status*, nor is it necessary. The first problem to solve is the meaning of *status* in the Roman Law ; and for this purpose it is enough to observe that aliens are not considered under the law of persons, and that hired servants belong to the region of *obligatio* and contract, under the law concerning things. If, therefore, Austin's explanation applies as much to classes excluded from, as it does to classes included in, the *jus de personis*, it is manifest that he has not found the right key, assuming, for the present, that there is a right key. If the *jus de personis* be not a mere heap of partially related fragments, and if there be any special principle underlying it, that principle is still to be sought for.

The next explanation is M. Blondeau's. It is based on the notion of capacity. The idea of legal capacity is defined by Mr. Austin with his usual clearness.

“ A person is *capable* of a given right, or is *capable* of a given duty, if, on the happening of a given event, the law would invest

the person with that given right, or would impose on the person that given duty. A person is *incapable* of the given right or duty, if on the happening of the given event, the law would not invest him with the given right, or would not impose upon him the given duty. A slave, for example, is incapable of acquiring property, by conveyance for valuable consideration, free gift, descent, or otherwise. A freeman is capable of acquiring that right, by those or other means."

Again—

"This term *capacity* or *incapacity* is the abstract of the term *capable* or *incapable*. To have a capacity, is to be capable; and to be capable, is to have a capacity."

The view proceeded on by M. Blondeau and others is that the object of the Institutional Writers was to single out the classes subject to incapacities for the convenience of exposition. This contains much that is plausible. The Indian Penal Code has a chapter in the beginning in which are enumerated the classes generally incapable of committing crimes, and this is convenient, for it saves the trouble of repeating under each crime, what classes are incapable of committing it. On the other hand, those classes that are incapable of committing only one or a very few crimes are not placed in the preliminary chapters, but are mentioned in connection with the particular crimes that they are incapable of committing. This method is reasonable, and perhaps necessary, but, as can be shown, it was not the method of the Institutional Writers, and therefore it does not give us the principle upon which they proceeded.

In the first place, if the plan of the Institutional Writers had been to give apart the classes of "incapables," it has been most imperfectly executed. Soldiers, aliens, the deaf and dumb, persons unmarried or childless, were subject to various incapacities, but do not occupy a place in the Law of Persons. Of course, it is open to say that their plan was not consistently followed out, but it seems fairer to try and find some solution that will acquit of them of this inconsistency.

But, in the second place, the most cursory inspection of

the Institutes reveals the fact, that the Roman writers almost uniformly mention any incapacity along with the subject matter to which it refers. Thus the incapacities of sons under the *patria potestas* crop out in the exposition of property, in testamentary matters, and in contracts and torts. So in regard to slaves, whose disabilities form a long title in connection with stipulations. This explains what appeared to Mr. Austin as so anomalous, namely that part of what he considered as belonging to the Law of Persons is taken up under the Law of Things. This is anomalous only to one who regards it as a part of the institutional scheme, to group together the leading classes for the convenience of exposition. But we are not obliged to take that supposition. We may hold that the deliberate purpose of the Institutional Writers was to expound incapacity in detail, under the particular head of law to which it applied. This, at all events, was their practice, and ought to be considered at least good *prima facie* evidence of their intention.

Without accumulating evidence that any attentive reader of the Institutes can gather for himself as to the actual mode of dealing with the classes of "incapables," one single crucial instance may be referred to. The treatment of the *peregrini* by Gaius is most instructive. He never contemplates for a moment that logically the *peregrini* ought to be distinguished from any other class of persons; for he expressly mentions the "*condicio peregrini*." *Conditio* is the regular synonym for *status*, and, if the Law of Persons be the Law of *Status*, as Mr. Austin distinctly holds, then unquestionably, the *peregrini* ought to be reckoned among the classes of persons. Does Gaius then give us a division into *cives* and *peregrini* as he does into *libertini* and *ingenui*? Nothing of the sort. The *peregrini* are indeed mentioned in the First Book, but not as an independent class; they are introduced in connection with the *potestas*, simply as a class incapable of acquiring it. *Peregrinitas* is dealt with as involving incapacity, just in the same way as other causes of incapacity, under the particular

head of law to which it refers. In subsequent books, *peregrinitas* is mentioned as preventing the acquisition of legacies, or frustrating stipulations. Nothing can be clearer than that it was no part of the scheme of Gaius to give an account of the *peregrini* detached from the general body of the law; on the contrary, he decisively adopts the alternative plan, of treating the incapacity under the special right to which it refers. If thus the *peregrini*, to whom Gaius attributes a *condicio* or *status* are so dealt with, what reason can there be for supposing that in similar cases Gaius adhered to a principle from which in this instance he strikingly departs?

Between *peregrinitas* and the other examples of *status* one distinction may be noted. *Peregrinitas* was nothing more than an incapacity; it was not the basis of any positive rights or duties. No relation of authority or subordination was created by it. But all the classes that have been enumerated in the Table as composing the department of *jus de personis*, although more or less subject to incapacity, are more characteristically marked by positive duties, as the duties of a slave, a wife, a son.

Two reasons have now been given for holding that the "law of *status*" is not the "law of incapacity;" first, because capacity is a more extensive topic than *status*; and secondly, because the Institutional Writers have, as a matter of fact, departed from the plan of constituting a classification based on the notion of incapacity. Those reasons are much strengthened by a third consideration, namely, that "incapacity" is not a leading characteristic of the classes of persons, but is altogether derivative and secondary. To borrow the language of logic, it is not of the essence of any class, but is merely a proprium, flowing necessarily from the definition of the class, but not otherwise a part of it. A slave is incapable of binding himself by contract, but why? For the obvious reason that the law did not afford him the means of performing his obligation. An obligation binds one to do or to give, but all that the slave had was his master's, and he could do nothing except

with his permission ; so that it is not within the slave's power to perform what he might promise. A son could not sue his father, for the very sufficient reason that the father owed him no duties. In like manner, whatever incapacities a tutor or guardian was under, may be traced to the duties he owed to his ward ; and whatever incapacities the ward was subjected to flowed from the necessary authority of the guardian. Thus the incapacity of a slave or a son to deal with men generally was simply another way of stating the special relation subsisting with the master or father. The law would have been self-contradictory if it had allowed a slave to create obligations inconsistent with the rights of his master. The incapacity of a wife to marry during the life of her husband is simply another way of saying that she already has a husband. If then in the notion of *status*, the positive duties involved are of primary significance, and "incapacity" altogether derivative and subordinate, it is manifest that the true key to the problem must be sought in the nature and relation of the positive duties. Whatever may have been the purpose of the division into *jus de personis* and *jus de rebus*, it cannot have been for the sake merely of convenience, to bring to the front the classes subject to legal incapacities.

The last solution remaining to be noticed is Savigny's. Unfortunately, his later observations were not before Mr. Austin, and have thus escaped a searching, though it might have been appreciative criticism. On the whole, Savigny's theory impresses us more favourably than either of the two others. He proceeds in the right way, by inquiring what common characteristics pervade the different classes of persons. Negatively, he holds that the *jus de personis* is not based on the notion of incapacity ; positively, that it coincides with family-law. What Gaius meant to give was an account of the rights and relations connected with the family ; and in this Savigny believes he not only took the most convenient arrangement for the subject-matter of Roman Law, but struck on a deep-seated principle of classification that must form a part of

every system of law. Savigny holds, then, that the words state or condition of men must be limited and confined to their state or condition in the family. According to him, rights may be arranged most advantageously in three great classes—family, property, obligation. Without at present arguing this point, it will be sufficient to examine whether Savigny accurately renders the notion of *status*, as understood by Gaius, and if so, whether the law of status should not rather be named the law of the family.

A great part of the law of persons obviously falls within the circle described by Savigny. The powers of fathers over their children, or of husbands over their wives, are manifestly leading branches of family-law. Slaves could not, from the prevailing modern point of view, be regarded as part of the family; but they were so, undoubtedly, according to the most ancient principles of Roman Law. If slaves are included, freedmen or emancipated slaves might also claim a place. Guardianship is intended to supply the want of paternal authority, and may, with a little stretch, be assigned to the family. The Curatorship of an insane or foolishly-extravagant person can hardly be considered to belong to family law; still less the *mancipium*. A father had the right to sell, or rather mortgage, his child to a stranger, but the servitude of the unlucky child, which severed him from his family, can scarcely be placed in the same category as his position under the *potestas*. On the whole, however, if a liberal extension be given to the word "family," the subject-matter of the law of persons is all more or less connected with it. It is a different question whether Gaius really meant by the law of persons nothing more or less than family-law. Savigny himself points out that if such had been the purpose of Gaius, it was not steadily kept in view. Thus marriage, the most important fact relating to the family, has no distinct position assigned to it, but is introduced, as it were, by a side wind, as the legal origin of the *patria potestas*. For the same reason, the subject of relationship, by consanguinity or affinity, ought to have a

conspicuous place; yet it is never in the whole law of persons once alluded to. Those are rather damaging concessions to make, for if the object of the Institutes were to give an exposition of family-law, it is surprising that of the two most prominent topics one should be mentioned only incidentally, and the other not even referred to. There is, however, a still greater difficulty behind. If the law of persons is meant to contain the family-law, it ought to embrace the effect of family relations on property. Now, the family relations, whether regarded as investing one with property or rendering him incapable of proprietary rights, are introduced in their place under the law of property, simply as investitive or incapacitating facts. Nay, more; the family relations have a bearing on obligation, and are again in the proper place referred to in the exposition of obligations. Taking all these facts into consideration, it is difficult to arrive at any other opinion than that in restricting *status* to family-law, Savigny unduly limits its scope.

If M. Blondeau's theory must be given up, and Austin's gives way before Savigny's, while Savigny's may almost be said to be disposed of by himself, must we hold that the selection of classes in the law of persons was determined without any guiding principle? Before resigning ourselves to this conclusion, several points require to be considered. It will be seen on a glance at the table of persons, that Gaius affected the mode of division known as dichotomy. Men are divided into free and slaves, the free again into those *alieni juris*, and those *sui juris*; into those *sui juris*, and those under a tutor or curator, and those who are entirely their own masters. A little reflection will show that the classification is not pedantic, but really solid and exhaustive. Taking the classes marked A, B, C, D, &c., in the Table, it will be seen that they are mutually exclusive. Those classified as slaves cannot appear under any of the succeeding divisions. Children under the *potestas* are not included in any of the other classes. Women under the power of their husbands are released from

tutelage, and women are under tutelage if they are not in the power of husband or father. Adding to the seven classes the remaining class of those who are not under personal subjection, we shall have the entire roll of citizens. If one had taken up a position on the Capitoline Hill, and had assembled the Roman people, and marshalled them into divisions, every person would have had a division to go to, and not more than one division would have been entitled to him. Nobody would have been overlooked, nobody would have been counted twice.

This arrangement is too perfect to have been the work of accident; and indeed the explanation of it is obvious. The classes fall into two broad divisions—(1.) those who are perfectly *sui juris*, that is, subject to no one's authority, and themselves capable of exercising authority over others; and (2.) persons under various kinds of subjection. In early times the class of persons not under control, and at the same time exercising no control over others, must have been exceedingly small, even if it had any representative at all: so that we may say broadly, Roman Society was composed of two main classes, a small one having the right to rule, and a large one whose duty it was to obey. Society was framed, and all the business of life transacted, on the basis of personal subjection. There is evidence of a period in Roman history when the whole law was exceedingly scanty; when the law of obligations was represented by a few delicts, the law of property by a few religious ceremonies, when no testaments existed, and when the succession to property was bound up with the headship of the family. At such a time the law of *status* was everything, the law of contract nothing, and the law of property next to nothing. In every legal difficulty, the first question that would be asked was, what was the *status* of the parties? Once that point was ascertained, in the generality of cases the difficulty would disappear. To a lawyer, the constant fact that he must never for one moment lose sight of, that, wherever he turned, constantly met his gaze, was *status*. Hence, the rules for determining *status* must have been objects of engrossing

care and attention, and have thrown the other topics of law comparatively into the shade. If we take a period immediately subsequent to the Law of the XII. Tables, we can see that the reasons for giving a prominent, and indeed foremost, place to the subject of *status* are irresistible. At such a time the *peregrini* would not be included in *status*, because, among other reasons, they were unknown to the law, and simply ignored by it.

It is important to estimate the place of *status* in the earliest times, because, although when Gaius came to write his Institutes, the law of property, testaments, and contracts was fully developed, still all the ancient heads of *status* were either in active existence, or, at all events, were of more than antiquarian interest, and considerable allowance must be made for the persistency of old ideas on the Roman jurists. Between Gaius and Justinian, however, much of the law of persons had become quite obsolete. Of the three forms of dominion over free persons, the *potestas* over children, the *manus* over wives, and the *mancipium* over other free persons, the *manus* and *mancipium* have become obsolete, and the severity of the *potestas* relaxed. The tutelage of women is forgotten. Still more striking is the difference between the Institutes and any modern system of law. Slavery is gone, the *potestas* over children is entirely changed in character, and almost the only direct representative of the ancient *jus de personis* is the guardianship of minors and imbeciles. Where slavery exists, it will probably be relegated to the law of property. The law of *status* from a position of exclusive and paramount importance has sunk into almost complete insignificance. The family, which played an important part in it, has long ceased to be the unit of the State; it has withered, and the individual has become more and more. The charge is summed up by Sir Henry Maine in a single sentence, that the progress of civilization has been from *status* to *contract*. The law of contract is to us what *status* was in the oldest Roman law. Accordingly, contract must give the principle of division to a modern code, just as *status* did to

Gaius. Gaius attempted to give an exhaustive enumeration of the species of authority exercised by private citizens over private citizens, as they were known to his law; and he would have justified his course by the intrinsic importance of that department of law, and by the community of character possessed by the different classes. It would have been extremely difficult for him, even had the requirements of a philosophical classification been more imperative than they were, to have brought together *status* and *obligatio*, not only because of the modern origin of the latter, but of the apparent discordance of their nature. It would have been a greater heresy, even, than to ask an English lawyer of the old school to fuse the law of real and personal property. In the time of Justinian the reasons for separation were greatly weakened, but the position of slavery would have been almost enough to cause the old classification to be kept up, even if the jurists of that day had been ambitious to do more than copy Gaius.

So far the true character of the *jus de personis* is clear; it is an historical aggregate. Is it anything beyond? Does it involve a fundamental distinction, that must always be recognised in jurisprudence? Before endeavouring to answer that question, it is desirable to state with more precision what is included by Gaius and Justinian under the *jus de personis*. There is (1.) an enumeration of the classes, specifying in what ways one may become, or cease to be, a member of any class; and (2.) an account, brief and scanty, however, of the personal duties constituting the *status*. The *jus de personis* comprehends a description of *status*, and of the duties owed by persons to persons thence arising. In other words, it explains *status*, and the rights *ad personam* belonging thereto; what the effect of *status* on the ownership and transmission of property, on inheritance, and on obligations was, is examined under these respective heads. In so far as *status* consists of incapacities it is dealt with exactly in the same way as other causes of incapacity.

Modern jurists find the deepest principle of classification in

the nature of rights themselves, in the familiar distinction between rights *in rem* and rights *ad personam*. A right *in rem* imposes a duty not on any specified individual, but on all men generally, and a duty not of a positive, but of a wholly negative kind. This is the juridical character of property. The ownership of an article implies that it is the duty of all men generally, not of any special individual, to abstain from interrupting the owner in the use and enjoyment of it. A right *ad personam* implies a duty binding on a specified individual or individuals only, and which may be either positive or negative. This class of rights is exemplified in every contract.

If the division into rights *in rem* and rights *ad personam* be assumed as fundamental, the *jus de personis*, in so far as it imposes duties on specified individuals, is evidently a source of rights *ad personam*. Is the proper place of the *jus de personis* alongside contracts, as a co-ordinate division of rights *ad personam*? If so, what would be the relation between the two departments? In other words, what is the difference between *status* and contract?

In executing a contract, the law seeks only to ascertain the intention of the parties; to that intention, when once discovered, obligatory force is ascribed. Every duty arising from a contract has been freely and voluntarily accepted. The determining cause of obligation is the will of the person who is bound. But the rights and duties constituting a *status* are not determined by the parties themselves, but by the law, and not according to their wishes, but according to its idea of what is best. In this lies the fundamental difference between the *status* of a slave and the position of a servant by contract. The work done by both may be substantially the same, only perhaps harder in the case of the free labourer, but the slave has no choice as to what he will do, or when he will do it, while the free labourer can regulate both, without hindrance from the law. Mr. Austin speaks of the relation of master and servant as an example of *status*, and adduces in support of this view, the fact that the master has an action, not only against

his servant for breach of contract, but also against one who entices him away. If the relation were one of contract simply, there would be an action for breach of contract, but not against a person who induced the servant to break his contract. Again, in the case of marriage, a husband can recover damages against the person who persuades his wife to violate her fidelity, as well as obtain a dissolution of the marriage. On the other hand, it is to be observed that the wife has no action against the woman who leads her husband astray. So that, if Mr. Austin's test be rigorously applied, the wife would have a *status*, but not the husband—the servant, but not the master; and we should be compelled to take up the duties of the wife under one division of law, and the duties of the husband under another. It seems rather that the special character of status upon which Mr. Austin has seized belongs to the old atmosphere of the *jus de personis*, and is too narrow to support a legal classification. Unquestionably, however, the remedy against third parties not privy to a contract would fully justify a distinction of species, although not, probably, of *genera*.

The true logical characteristics of status as opposed to contract are well exemplified in the case of marriage. Marriage is commonly spoken of as a contract, as it is a state supposed to be created by the consent of the parties. But if it be a contract, it is one of which nearly all the terms are fixed by the law, and the parties have no power to vary them. The duration of the contract is unalterably settled by law, beyond the power of the parties to modify it. The law recognises no stipulation for liberty of “consortium,” and, in a word—for it is needless to heap up details—nearly all the duties of married persons are fixed by the law, and the only thing left to the consent of the parties is whether or not they shall enter into the state of matrimony. But for this small fraction of free volition, marriage would never be thought of in any other light than as a *status*. Now, among the Hindoos, the consent of the parties is eliminated, and yet in all substantial respects

marriage is not a different institution in India from what it is here. There as well as here the cardinal feature of marriage exists, namely, that it is made *for* us, not *by* us. There is only Hobson's choice. The parties to the contract, so-called, are not permitted to make such an arrangement as would be for mutual convenience, but all must be stretched like Procrustes on the same bed. Whether the relation of the sexes ought to be left to free contract is a question of public policy, but the manner in which it is decided cannot be without effect in fixing the position of marriage in a scientific classification of legal topics.

The Roman Law, in the course of its eventful history, exemplifies marriage both as a status and as a contract. The authority of the husband over the wife, as regards both her person and property, was called *manus*, and it still existed, in the last stage of decay, in the time of Gaius. The wife was placed in the position of a child, and is spoken of as, in law, the daughter of her husband. Marriage was regarded as creating a *status*, although it was made certainly with the consent of the husband, and probably also with the consent of the wife. When, however, the *manus* fell into desuetude, its place was left unoccupied. The husband had no control over his wife's property, unless it was given him by the marriage contract; and either husband or wife could dissolve the marriage at pleasure. Marriage then became substantially a free contract, for although, in the eye of the law, it was perpetual, yet it could at any time be dissolved without the interposition of a court of law. Subsequently, this liberty was restricted. A species of legislation arose, the object of which was to bribe persons into marriage, and to bribe them to keep in it. The policy adopted resembled our Irish Land Act, which, dealing with precarious tenancies, established a series of checks against capricious eviction.

A broad distinction is thus found to exist between *status* and contract: in the former the will of the lawgiver is paramount, in the latter the volition of the contracting parties.

This distinction, although well marked in extreme cases, is not absolute. Even in marriage the will of the parties is not, in our law, altogether ignored. The law makes the cap, but it does not compel them to put it on. So even in the freest contracts, the State occasionally interposes by way of restriction or prohibition, but generally for no other purpose than to facilitate the realization of the wishes of the parties. In cases like the Irish Land Act or the Factory Acts, the law purposely limits the freedom of contract; and where its interference is limited to a single point, namely, to protect a class against its feebleness, and enable it to obtain the terms it would alone consent to without the irresistible pressure of untoward circumstances, the proper course would doubtless be to regard the relation as still one of contract. The law aims merely at putting the persons on an equality in making the terms of the contract. Far different is the purpose of its interference in marriage, or in determining the duties of parents towards children or guardians towards wards. The overruling consideration is not the wishes of the parties concerned, but public policy—what the State conceives to be the most beneficial relation. The difference, then, between the two principles seems adequate to support all that is contended for, namely, a division between *status* and contract as sources of rights *ad personam*.

The proposition that *status* should be co-ordinated with contract, as the two leading branches of rights *ad personam*, is condemned by Savigny, on the ground that the difference between contract and family obligations is too vast for them to be brought into so close a connection. The difficulty of following any other course appears from Savigny's own proposal. He divides family law into pure and applied—the applied family law relating to the effect of the family relation on property, and he would postpone the second part until after the law of property or obligation. It seems not worth while making a special department of family law, and splitting it up into two sections, one at the beginning and the other almost at the end

of the exposition. Another mischief would be in giving up the distinction of rights *in rem* and rights *ad personam* as the basis of classification. Whether the practical value of that distinction is as great as its logical thoroughness, is a question that cannot be examined at the end of an argument already too long. The object of the present inquiry is narrower; assuming the propriety of classifying law according to rights *in rem* and rights *ad personam*, what place ought to be assigned to the *jus de personis*? It will suffice if, on the present occasion, the old division into *jus de personis* and *jus de rebus* is shown to have no paramount claim to the attention of a modern jurist, and if the ground is cleared for an arrangement based upon, and suited to, the necessities of modern law. For it must always be borne in mind that the true principle of arrangement must be looked for in the material arranged; that it must be evolved from within the subject-matter, not imposed upon it as a law from without.

ART. IX.—THE LAW OF DISTRESS.

IT has been said that no subject has given rise to more legislation than that of distress.* We may safely affirm that there are few branches of the law in which legislation is more urgently required. We need hardly remark that this state of things is a perfectly natural result of our system of framing legal procedure. Instead of inventing an original remedy, we usually prefer to give a new scope to an old process. Instead of revising the details of such process, we leave them untouched until their inconvenience becomes intolerable. A measure is then

* 3 Reeves' English Law 555 n. (last ed.)

hastily passed to redress the most pressing grievance, but no attempt is made to remove less obvious anomalies, or to bring the ancient remedy into complete accordance with the wants and ideas of modern society. Of this method of legislation the law of Distress affords an admirable illustration. Originally derived from the Gothic nations of the Continent,* this process was employed by our Anglo Saxon ancestors to compel the appearance of a debtor in court. Under a law of Canute, passed to prevent the unfair exercise of this power, the defendant was to be thrice summoned to submit to the judgment of the hundred, and a fourth day of appearance was to be fixed by the shire; after which, if the misguided man still continued contumacious, the complainant might seize his goods.† From a very early period, by the custom of the realm, as Fleta tells us, a man might seize and impound beasts which he found trespassing upon his land, until he received compensation for the injury.‡ After the introduction of the feudal system, distress became the ordinary means of compelling tenants to perform the services and to pay the fines and amerciaments incident to their tenure.§ The barons found the seizure of the tenant's goods a more speedy and effectual mode of obtaining satisfaction than the forfeiture of his feud. Moreover they discovered in the new remedy an instrument of oppression of which they were not slow to avail themselves. They distrained for illegal fines and customs not really due; stripped farms of the whole produce, seizing goods of great value for the smallest service, and drove the chattels and cattle distrained into their castles to prevent them from being restored upon replevin. The Sovereign did not neglect this method of supplying his needs. The records of the Exchequer relate that on one occasion the burgesses of Gloucester paid a fine of three hundred lampreys that they might not be distrained to find the prisoners

* Spelman Gloss : tit. *Parcus*, p. 447.

† 1 Palgrave's *Rise, &c.*, of the British Constitution, 180.

‡ Fleta, 101. § Britton, liv. I, ch. 28, 58.

of Poictou with necessities "unless they would do it of their own accord."*

To remedy these evils a series of statutes was passed, extending from Magna Charta to Stat. 1 and 2 Ph. and M., c. 12. These enactments re-affirmed the provisions of the common law, protecting the tenant against wrongful distress, and affixed heavy penalties to some of the more audacious violations of justice.

With the decline of the feudal system the process of distress lost much of its oppressive character. It was no longer a weapon in the hands of a powerful baron, but merely a summary mode of recovering rent reserved on a contract of lease voluntarily entered into. Means of evading the process were speedily discovered. Since a distress could only be made on the demised premises, the removal of the goods afforded an easy mode of depriving the landlord of his remedy. Since a distress could only be taken for rent in arrear during the continuance of the lease; the last half-year's rent, which was generally not in arrear until after the expiration of the lease, could not be distrained for. Moreover, as the distress was simply a pledge, to be retained at the risk of the landlord, until the rent was paid, it afforded no remedy in the case of a tenant who obstinately refused to redeem his goods. The current of legislation which had previously been exclusively directed to the protection of the tenant, underwent a change, and the object of nearly all the statutes subsequent to that last above-named, was to improve the remedy of the landlord. He was authorised to follow and distrain goods fraudulently removed; to distrain within a certain time after the determination of the lease; to take certain classes of goods not previously liable to distress, and a complete revolution was effected in the character of the process by the well-known Act of William and Mary, conferring on the landlord power to sell the goods distrained.

* *Madox's History of the Exchequer*, chap. 13, p. 507.

The modern Statutes have almost exclusive reference to distress for rent, and it is to this branch of the process that we propose to restrict our remarks. We do not intend to discuss the policy of the law, or to suggest any serious modification of the privileges of the landlord. We take it for granted that this favoured individual should be allowed an advantage over all other creditors in the recovery of his debt. Assuming this, however, it is obviously desirable that the landlord's special remedy should be so well-defined and simple as to save him from the danger of error, and the tenant from the temptation to avenge himself by an action at law. The process, moreover, ought to be applicable to all cases in which payments by way of rent are reserved. Above all it ought to occasion the least possible inconvenience and loss to the tenant. Let us see how far the present law of distress for rent fulfils these conditions.

At the very threshold of the subject, we are confronted with several important limitations of the right to distrain, complicated with distinctions of singular subtlety. No distress can be made, except by express agreement, for payments by way of rent reserved on leases of mere chattels; but a mixed payment of rent for chattels and corporeal hereditaments—as, for instance, rent for furnished lodgings—since it is held to issue out of the hereditaments only, may be recovered by distress. Rent reserved on a mere licence to use premises for a particular purpose, as in the common case of a letting of a mere standing for machinery, cannot be distrained for, but if the letting is of the exclusive use of a defined portion of a room in a mill, the landlord may resort to this remedy. Rent due under a mere agreement for a lease, although the tenant may have entered under it, and continued in occupation for some years without paying rent, cannot be recovered by distress; but if the tenant, after entering into occupation, promises to pay a certain rent, or even only settles it in account with his landlord, a new agreement will be presumed, under which the landlord may have the right to dis-

train. Under a very ancient* and wise rule of the Common Law, the remedy of distress is confined to rents of fixed amount. It would be obviously in the highest degree undesirable that the landlord should have the power of deciding for himself the amount of rent for which the seizure should be made. Where that amount has not been certainly fixed, he must resort to an action for use and occupation. This rule, however, like the limitations above-mentioned, has been construed liberally for the landlord. According to Coke there may be a certainty in uncertainty, and it is held that a distress may be made for any rent which is capable of being reduced to a certainty. Hence a rent of 8*d.* per cubic yard for marl got, and 1*s.* per 1000 for bricks made, may be distrained for, although it is obvious that questions may arise between landlord and tenant as to the amount of marl actually got, or the number of bricks actually made.

Another rule of great antiquity is, that the person distraining must possess a reversion in the demised premises.† Hence no distress can be made for rent reserved upon the assignment of a lease, but the reservation of a reversion of a single day will authorise a distress; a tenant from year to year underletting from year to year, has a sufficient reversion to enable him to distrain, and a mortgagor permitted by the mortgagee to continue in receipt of the rents of the mortgaged property, may distrain for rent due upon a lease made before the mortgage. It has been recently held that the reversion to support a distress need not be an actual reversion; that it is sufficient if it be a reversion by estoppel, and that if the tenant is actually let into occupation there is a reversion which he is estopped from denying.‡

Other restrictions upon the landlord's power to distrain have reference to the time at which it may be exercised, and in these we perceive a somewhat different current of

* See Britton, liv. I, ch. 28, 57b.

† Lit. s. 214, Bro. Abr. tit. *Dette* pl. 39; citing Year Book, 43 Ed. 3, 4.

‡ Judgment of Blackburn J. in *Morton v. Woods*, 37 L.J., Q.B., 248.

judicial opinion. We have already mentioned that no distress can be made until the day after that on which the rent becomes due, and that a statutory remedy has been provided for the fraudulent removal of goods to avoid a distress. By a strict construction of the Statute its operation has been limited to cases in which the goods were removed *after* the rent became due. Goods previously removed cannot be seized for rent; hence, at any time before the rent day, a tenant may carry off his chattels in full view of his landlord, and with the avowed object of avoiding a distress. A man cannot distrain for rent in the night, because, as Chief Baron Gilbert says, the tenant hath not thereby notice to make a tender of his rent, which possibly he might do to prevent the impounding of his cattle.* As night is held to extend from sunset to sunrise, it appears that, in summer at least, a distress may be made before the person, whose goods are seized, is awake, and cannot be made in the evening, when he is most likely to be at hand to tender the rent.

Let us suppose, however, that a landlord duly entitled to distrain has resolved to adopt that remedy. His first step is to appoint a bailiff, and the first care of that functionary is to protect himself against the risk arising from his own incompetence, by inserting in the warrant to distrain a carefully worded indemnity by the landlord. His next proceeding is to seek admission to the demised premises, and, thanks to the numerous cases which have been decided upon this subject, the limits of what he may and may not do, in order to effect this purpose, are marked out with tolerable clearness. It is not always quite so easy to discern the principle upon which the decisions are based. The leading rule seems to be that the bailiff may enter in the ordinary mode adopted by other persons who have occasion to go into the premises.† It has, however, been held that he may climb over a garden wall, or enter by an open window,

* Gilbert on Distress, 50. † *Ryan v. Shilcock*, 7 Ex., at p. 75.

methods of obtaining admission which cannot be considered as usual. Since the Englishman's house is his castle, the person distraining must not break the outer door, or unhasp a window, or open an unfastened window. It is not quite obvious why the Englishman's stable, not situate within the curtilage of his house, should also be deemed his castle; yet although the sheriff may break open the stable door, a person distraining for rent is not entitled to do so. The rule in *Semayne's case* appears to have been understood by the old authorities as prohibiting the person distraining from opening the outer door if it happened to be shut and not fastened, and a similar construction has been adopted in America, where it has been held that a sheriff's officer cannot even lift the latch of an outer door in order to open it.* Recent English cases, however, have established the right of the person distraining to open the outer door in the ordinary way, but the tendency of judicial opinion appears now to be towards a stricter interpretation of the rule.†

The protection from distress extends only to the outer shell of the building. If the external door is open the person distraining may break open inner doors. Hence, a lodger who has an outer door may, by keeping it locked between sunrise and sunset, prevent his landlord from availing himself of his remedy by distress; but if, although renting the upper floors of a house as tenant from year to year, he has no outer door, he is not considered to have a castle, and the landlord's bailiff may obtrude himself under circumstances as inconvenient as those in the case in *Hobart's Reports*, where an entry by a bailiff, who broke open the door of a chamber where a man and his wife were in bed, was held to be lawful.‡ The prohibition of breaking the outer door is also limited to the first entry of the person distraining. If, after having lawfully entered he is forcibly ejected, or if, having gone out with the intention of returning, he finds himself

* *Curtis v. Hubbard*, 1 Hill's Rep., 336.

† *Nash v. Lucas*, L.R. 2 Q.B., 590.

‡ Hob. 62, 263.

barred out, he may break open the door to regain possession. Nice questions have arisen as to what is a sufficient possession to entitle the landlord to adopt this course. In the case of *Boyd v. Profaze*,* the defendant, in going to distrain, lifted the latch of an outer door and had got his arm and foot inside, when the servants, with considerable presence of mind, placed a table between the door and a copper which stood near, and squeezed the unfortunate man between the door and the doorpost. By inserting a pair of shears in place of his limbs he succeeded in preventing the door from being closed, and having afterwards entered by force, contended that he had previously obtained a sufficient possession to entitle him to do so. The judge, however, was of opinion that the entry by the arm, foot, and shears, not being a peaceable possession, could not have that effect. After so much elaborate care bestowed upon the definition of lawful and unlawful modes of entry, it is rather surprising to find that actual entry on the demised premises is not essential to a distress. In his judgment in *Cramer v. Mott*, the Lord Chief Justice says, that where the article seized "is just inside the door, the tenant at the door, and the landlord's wife," acting as his agent, "in such a position as to be able in one moment to put her foot in the room, it must be taken that she was constructively in the room."†

The principle of the law is that as the landlord is supposed to give credit to a visible stock on the premises he ought to have recourse to everything he finds there.‡ In point of fact, however, while this rule has been rigidly enforced in some directions, it has in others been considerably relaxed. The goods on the demised premises may belong to the tenant, yet not one of them may be distrainable for rent. The goods may not belong to the tenant, yet may be seized and sold to satisfy his debt. So long as the things distrained were merely kept by the landlord as a pledge, to be returned to the owner

* 16 L.T., N.S., 431.

† 39 L.J., Q.B., 173.

‡ Judgment of Ashhurst, J. in *Gorton v. Falkner*, 4 T.R., at p. 568.

on payment of the rent, no great hardship was inflicted on third persons, whose property was taken ; but since the power of sale has been conferred on the landlord, the operation of this rule is often extremely harsh. An undertenant or lodger who has paid his rent to his immediate landlord, is liable to have the whole of his goods seized for arrears due to the original landlord. Articles hired by the tenant from tradespeople may be sold to realise the rent. On both sides of the Atlantic this provision of the law has met with strong judicial disapprobation,* and in several states of the American Union has been abolished. A Bill was introduced by Mr. Sheridan into the House of Commons during the present Session to relieve the goods of undertenants and lodgers from liability to be distrained for rent due to the original landlord, and after being read a second time was referred to a Select Committee. It is to be hoped that this very reasonable reform may speedily be effected. We may remark in passing that while goods belonging to third persons are liable to distress, animals *feræ naturæ* are exempted from distress on the express ground that they belong to nobody.

From the circumstance that the distress was originally a pledge, to be restored to the tenant when satisfaction was made, it naturally followed that nothing could be taken which was incapable of being restored in the same plight as when it was seized. Hence perishable articles, such as milk and meat, cannot be distrained, and fixtures which cannot be severed without detriment, are also exempt from distress. This doctrine has, however, been extended to the class of things known as tenant's fixtures, an essential attribute of which is, that they are capable of being removed without material damage. Since it was considered unjust to deprive the tenant of the means of redeeming his pledge, a conditional protection was afforded to his implements and stock. The tools of the workman, the cattle and sheep of the farmer, and the books of the

* See observations of Blackburn J., in 39 L.J., Q.B., 173, and of the Chief Justice in *Brown v. Sims*, 17 Serg. & Rawle, 138.

scholar can only be seized if there are no other sufficient goods on the premises to satisfy the distress. The exemption of goods from distress while in the hands of a tradesman rests on a different footing, and appears to be based on the benefit derived by the commonwealth from the exercise of a public trade.* Originally the protection appears to have been almost exclusively limited to goods sent to the tenant to have labour bestowed upon them and to be returned in an altered condition,† but the case of *Gilman v. Elton*‡ extended it to goods sent in the way of trade for the purpose of sale, and it has been recently decided that articles pledged with a pawnbroker cannot be distrained by his landlord, although they may have remained in the possession of the pawnbroker for more than a year without any payment of interest.‡ By a somewhat arbitrary restriction the exemption from distress is denied to goods placed in the hands of the tenant merely with the intent that they shall remain on the premises; hence horses and carriages sent to a livery stable-keeper; § wine sent to a wine-warehouseman to be matured,|| and probably also furniture deposited with a furniture warehouseman, may be distrained for rent due by the tenant, although his trade consists exclusively in the reception and care of the articles deposited with him.

Not only must the person distraining exercise the greatest care as to the description, but also as to the value of the goods distrained. He is bound to ascertain that such value does not greatly exceed the amount of the arrears of rent. On the other hand he must take sufficient to cover his demand, for, in general, no second distress can be made for the same arrears of rent. He is to estimate the value of the goods seized at the price they would fetch at a broker's sale; but he may be liable to an action for excessive distress,

* See *Muspratt v. Gregory*, 1 M. & W., p. 645.

† Co. Lit., 47 a. ‡ 3 B. and B., 75.

‡ *Swire v. Leach*, 18 C.B., N.S., 479.

§ *Parsons v. Gingell*, 4 C.B., 545.

|| Ex parte Russell, 18 W.R., 753.

although the goods fairly sold under the distress did not in fact realize the amount of the rent and costs.

The processes of seizure and impounding have long ceased to possess any importance. Almost any unequivocal expression of an intention to seize will suffice, without touching the goods or entering upon the demised premises. A mere refusal by the landlord or his agent to permit chattels to be removed until the rent is paid, has been held to amount to a seizure.* In like manner impounding, which in ancient times necessarily involved the removal of the goods, may now in many cases be effected without the slightest change in their ordinary position, and without locking up the premises or leaving any one in possession.† It follows that the acts of seizing and impounding may be simultaneously effected, and that the period between these acts during which the tenant might formerly tender the rent and expenses and obtain an immediate return of his goods, has no longer any existence. At Common Law, a tender after the goods had been impounded was unavailing, and this singular result ensued, that whereas the only object of permitting a landlord to distrain was to enable him to obtain payment of his rent and costs, he might refuse to receive such payment, and in spite of the tender, proceed under the Statute to sell the goods distrained. Moved by the grievous hardship to the tenant of this state of the law, the judges have sanctioned an action on the equity of the Stat. 2 W. & M., sess. 1, c. 5, in case of the sale of the goods after a tender made within the five days allowed to the tenant to replevy.

The provisions of the Statute conferring the power to sell the goods distrained, have, on the whole, been somewhat strictly construed. The notice of distress must be in writing, and the inventory must specify with reasonable certainty the articles taken; the latter must in all cases be appraised

* *Cramer v. Mott*, L.R., 5 Q.B., 357.

† See *Swann v. Falmouth*, 8 B. & C., 456.

by two sworn appraisers, and the landlord is not permitted to appraise the goods, or to buy them under the distress.

In reviewing this subject, the chief point calling for remark is the fact that the whole conduct of the process is left in the hands of the person least concerned to protect the interests of the tenant, and most inclined to exercise harshly the rights given him by law. The power of distress to compel appearance on civil process was at a very early period placed in the hands of the sheriff acting by virtue of the king's writ; but upon a distress for rent, the law still "allows a man to be his own avenger, and to minister redress to himself." To confer on an interested individual the power of seizing and selling the goods of his adversary, is to afford an obvious temptation to unfair dealing; and the existing checks on abuse must be admitted to be entirely inadequate. Notice of the distress is to be given to the tenant; but this notice need not accurately state the amount of rent for which the distress is made. The goods are to be appraised by two sworn appraisers; but since these persons are employed by the landlord, and are permitted to purchase the goods at the appraised value, it is obviously their interest to make as low an appraisement as possible. The landlord is to sell at the best price; but goods sold at the appraised value are presumed to have been sold for the best price. The overplus of the sale is to be left in the hands of the sheriff, under-sheriff, or constable, for the owner's use; but since no scale of charges for distresses for arrears of rent exceeding 20*l.* has been established, the landlord and his bailiff may deduct a large sum for the costs of the distress and sale. On the other hand, the temptation to vexatious litigation on the part of the tenant is scarcely less powerful. The existing process of distress is so full of legal pitfalls that a person who desires to revenge himself upon his landlord for distraining, can hardly fail to find a pretext for involving him in an action. Of all the various sources of litigation, however, the employment of unskilled bailiffs appears to be

the most fruitful. Every inexperienced auctioneer deems himself qualified to act in this capacity, and the landlord has frequently to pay heavily for the ignorance of his agent.

But while responsible for any irregularity in the conduct of the distress, the landlord is not liable for illegal acts committed without his knowledge or sanction by the person employed to distrain, and the consequence is that for grave injuries, such as the taking of goods exempted from distress, the tenant's only remedy is against the bailiff, who may be a mere man of straw. It appears to us that much of the evil at present attendant upon the exercise of the right of distress for rent might be obviated by the adoption of a similar provision to that contained in the New York Revised Statutes,* under which every distress must be made by the sheriff upon the previous affidavit of the landlord or his agent, stating the amount of rent due, and the time when it became due. The present process of distress, as Lord Mansfield long ago pointed out, is neither more nor less than an execution, and there can be no reason why it should be conducted in a different manner from other executions. As at present conducted it cannot be said to afford a remedy which is either safe for the landlord or just to the tenant.

ART. X.—PRISON DISCIPLINE AND REFORMATORY TREATMENT.

Transactions of the National Congress on Penitentiary and Reformatory Discipline, held at Cincinnati, Ohio, October 12, 1870. Edited by E. C. WINES, D.D., Chairman of the Publishing Committee. The Argus Company. Albany, 1871.

WAR in America has been followed, as in all history, by an increase of crime. In King Edward VI. remains we read "For idle persons, there were never, I think, more

* Vol. II., 501, ss. 2, 3, 8.

“than be now. The wars men think is the cause thereof. Such persons can do nothing but rob and steal. But slack execution of the laws hath been the chiefest sore of all : the laws have been manifestly broken, the offenders banished, and either by bribery or foolish pity escape punishment.” It being thus in England then, we cannot wonder that while there was a great diminution of commitments during the late civil war—after the war, there was a heavy increase of crime, and our prisons were filled to repletion.” To this fearful augmentation of the criminal classes in America may perhaps be attributed the extraordinary zeal with which every fact or suggestion with reference to the repression of crime has been collected by the promoters of the Cincinnati Congress. To the energy of Dr. Wines, their chairman, we are indebted for a most complete catalogue of English, American, and continental works on the subject of penitentiary and reformatory discipline. But this Congress has also collected and published in the volume before us the original thoughts of some of the best known authorities. England is represented by Miss Carpenter, Sir Walter Crofton, Sir John Bowring, Mr. M. D. Hill, Mr. Edwin Hill and others. Denmark by Mr. F. Bruün, Inspector-General of her prisons. France by M. Bonneville de Marsaugy, counsellor of the Imperial Court of Paris, and M. A. Corne, advocate of Douai, and Italy by Signor Martino Beltrani Scalia, Inspector-General of prisons, while nearly every State in America sent its representative to add to the practical work of the congress. Therefore, as may be supposed, the six hundred pages before us contain a mass of valuable statistics and intelligent deductions, which makes them a most valuable contribution to our knowledge on these matters. With so much that is good, it is difficult to select the more remarkable papers, but we especially desire to call attention to the principles of penitentiary and reformatory discipline suggested for the consideration of the congress. After defining crime as an intentional violation of duties imposed by law,

which inflicts injuries upon others, the report gives us the following important principles:—

“The treatment of criminals by society is for the protection of society. Since, however, punishment is directed not to the crime but to the criminal, it is clear that it will not be able to guarantee the public security, and reestablish the social harmony disturbed by the infraction, except by reestablishing moral harmony in the soul of the criminal himself, and by effecting, as far as possible, his regeneration—his new birth to respect for the laws. Hence the supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering. In the prison laws of many of our States there is a distinct recognition of this principle: and it is held by the wisest and most enlightened students of penitentiary science.”

After confirming this opinion by quoting those of the most eminent criminal reformers, the report states:—

“But neither in the United States, nor in Europe, as a general thing, has the problem of reforming criminals yet been solved. While a few are reformed, the mass still leave the penitentiary as hardened and dangerous as when they entered, in many cases more so.”

Then are recommended the progressive classification of prisoners, based on merit, so that each prisoner should pass through (1.) A penal stage with separate imprisonment, (2.) A reformatory stage worked on a mark system, and (3.) A probationary stage into which should be admitted only those who are believed to be reformed, and by which the reality of their reformation should be tested. The rewards of the prisoners should consist of diminution of sentence, a participation by the prisoners in their earnings, a gradual withdrawal of prison restraints, and increased privileges so that during the prisoner's incarceration his comfort or the reverse should depend on his own conduct. The congress urges with great force the necessity of special training for prison officers, for as is justly observed, “only when the

administration of public punishment is made a profession will it become scientific, uniform, and successful. Once let it become the heartfelt desire and intention of prison officers to reform the criminals under their care, and they will speedily become inventive of the specific methods adapted to the work." We commend to the consideration of our prison authorities the following suggestions made with reference to the unnecessary degradation of prisoners:—

"When a man is convicted of a felony or misdemeanor, and shut up in prison, he cannot but feel the disgrace of his crime and sentence, and a degree of degradation consequent thereupon. Beyond this, no degradation, no disgrace should be inflicted upon the prisoner. His self-respect should be cultivated to the utmost, and every effort made to give him back his manhood. A degraded dress, stripes, all disciplinary punishment that inflict unnecessary pain or humiliation should be abolished as of evil influence. Instead, the penalty for prison offences should be the forfeiture of some privilege or a part of the progress made towards liberation, with or without a period of strict imprisonment. There is no greater mistake in the whole compass of prison discipline, than its studied imposition of degradation as a part of punishment."

It is well to remember that these are not the words of a few philanthropists, dabbling in matters with which they have only a theoretic knowledge, but that they are the solemn declarations of governors of prisons, gaol chaplains, and men whose whole lives in many cases have been devoted to the care and control of criminals. So far as our own observation has been concerned, it has always been worthy of remark that those who press for severity, degradation, and violence, as means of repressing crimes of violence, and offences arising from brutal and debased minds, are not men who have had experience in the management of criminals, but the pharisees of morality, whose acquaintance with human nature has been probably picked up by regular perusals of the unedifying literature of our criminal courts. While,

however, the Congress recommends a humane treatment of the criminal, it is careful to point out that the reformation of a prisoner can be attained only through a stern and severe training, and this can be best attained by employing him upon some useful occupation. The doctrine that none of the skilled mechanic arts should be introduced among convicts is well met, and in an important paper by the Inspector-General of Prisons in Denmark, the writer explains a system by which prisoners may be taught a large number of trades without loss, nay, with profit, to the Government of the country. In Denmark, M. Bruün says :—

“The aim has been during the last ten years, to transfer the management of prison labour into the hands of private persons. To this end two methods have been adopted. *Either* orders are accepted from private persons, who themselves furnish the raw material, in which case payment is made according to measure and weight, *or*, a certain number of prisoners are let to a citizen contractor for the payment of a certain sum per day for each prisoner. In the former case, the contractor is entirely excluded from the prison, and the work is superintended by the masters of the establishment, in the latter case, where the work is supervised by the contractors’ masters; a contract, therefore, is concluded between the chief of the prison department (not the director of the establishment) on one side, and the contractor on the other, of which contract the director receives a copy for the regulations of his conduct under it.”

We regret that our space will not permit us to quote these regulations, as they occupy two or three pages of the Report. Under them, however, we find it has been found possible to teach a multitude of different industries, in which about 80 per cent. of the prisoners in Denmark are occupied. M. Bruün’s paper is full of interest and of valuable suggestions. We are assured the domestic cleanliness of the prisons is not better in any private house, but we trust that private persons are accustomed to a more frequent

change of linen and stockings than once in a fortnight, and, for ourselves, we own a preference for clean sheets more than once in four weeks.

Practical experience is supplemented in this Report by practicable theory, as is evidenced in a suggestive paper On the Ideal of a true Prison System for a State, by Mr. G. R. Brockway, Superintendent of the Detroit House of Correction; Criminal Capitalists, an Essay by Mr. Edwin Hill, and the proposed Volunteer Adult Reformatory, at Warsaw, New York. In the last paper, however, we are somewhat disappointed, as the plan of organisation is scarcely sufficiently traced.

Among the more practical contributions are, a description of the Port Blair Penal Settlements in British India; The Irish System of Prison Discipline, by Sir Walter Crofton; The Ohio Reform Farm Schools, and Executive Pardons; the last of which offers a valuable commentary on our English system of pardons.

We are glad to see Miss Carpenter insisting that the parents of children in industrial schools must be made to contribute, in some degree, to their maintenance. Parents must be made to understand that upon them, and not upon the Government, the magistrates, or the police, rests the responsibility of the child's training. If the School Boards can succeed in enforcing this responsibility, it seems to us they will do good, but if this is neglected, we feel certain that children who have had the benefit of free board and education, will, when they become parents, be scarcely inclined to undertake the self-denial which was denied them by their fathers.

There are many points in this most interesting Report which we should have been glad to discuss, but we cannot do so now. The questions arising from criminal lunacy, the punishment for larceny being measured by the value of the property stolen, rather than the manner of the theft, and the necessity of a complete system of criminal biography as suggested by

M. Bonneville de Marsaugy are all such as may occupy the thoughts of our prison reformers until the forthcoming International Congress of 1872. This Congress, which the learned editor of these transactions is now organising with considerable success in London, will, we trust, contribute as largely to our knowledge of the right principles of criminal jurisprudence and penology, as the late successful meeting in Ohio has added to that of our American kinsmen.

ART. XI.—LITERATURE OF THE IRISH LAND QUESTION.

THAT public attention was called in a very remarkable degree to the Irish land question during the years 1869-70-71 will be apparent to all frequenters of libraries and consultants of catalogues in the years to come. There might be constructed a long list of publications, varying in size and character, from the portly historical or legal volume, to the brief political or social pamphlet, all of them having issued from the press during a short space of two or three years. These have been more or less consulted or studied: and while some have been thrown aside, others deserve a better fate, and have some chance of being remembered after the exigency which called them forth shall have passed away, and when new and equally pressing questions shall arise to occupy the minds of legislators, and render miserable the lives of ministers.

Yet it cannot be believed that the land question is settled, even in Ireland. A large party hold that recent changes in what they consider to be the right direction have not gone far enough. A smaller party hold that the new legislation is mischievous, and will require correction. Nearly all are agreed that there are elements of uncertainty which must result in further inquiry, and in more clearly-defined, if not in more extensive, alterations in the legal system. And if the new

landlord and tenant code works legally and beneficially, it can hardly be doubted that it will render necessary some changes in the administrative departments of the law, and will indirectly lead to a reconsideration of the relations of landlord and tenant in England and Wales.

Further, there is an entire division of the Irish Land Act (Part II.) which, for causes which will be hereafter glanced at, is not working, and without certain alterations is not likely to work. There was a clear intention on the part of the legislature that occupying tenants should be assisted in purchasing, and under proper limitations enabled to purchase, the fee simple of their farms. This portion of the Act was regarded with great interest by many who disapprove of the broadly marked distinction between landowners and farmers, who remark with regret the diminishing number of the proprietors. This question is rapidly attracting the notice of the thinking classes in England, and it affords a further reason for concluding that the land question has only passed through a single stage, after which a long vista of further discussion seems to be opening out. Under this belief it may be useful to commemorate, and briefly to describe, some of the more important publications which have marked the epoch of the Irish land legislation of recent days.

Perhaps the first book which drew public attention—at least the attention of the thousands who resort to circulating libraries—to the condition of the Irish tenant, was the collection of romantic reminiscences which came out under the name of Mr. S. Trench. The book was well written, and it abounded in lively incident and graphic portraiture. It was the work not of a mere novelist, but of an experienced land agent. None would doubt its general authenticity, although all who were familiar with Ireland recognised in it a collection of stories by no means calculated to convey a correct picture of the Ireland of 1869. The book was in short a somewhat exaggerated sketch of an Irish tenantry of twenty years ago.

Here then was a popular exposition of landlord and tenant life addressed to the general public, who had previously voted the question a particularly dry and heavy one, fit only for the writers and readers of Parliamentary Blue-books. Some time after, the *Times'* correspondent packed up his portmanteau, and, note-book in hand, traversed the more accessible districts of Ireland, collecting all such information as an observant tourist may gather together. Fortunately the selection had been judiciously made of a highly cultivated man, himself connected with the proprietary class, yet not destitute of sympathy with the poorer grades of his countrymen. The performance of Mr. O. C. Morris was highly creditable, and there can be no doubt whatever as to the fact that many of his suggestions were considered and adopted by the framers of the new law. After the passing of that memorable enactment, Mr. O. C. Morris resumed his pen, and published an annotated edition of the Statute, which would have been more valuable had it contained fewer of historical, and more of legal, notes and elucidations. This may be an appropriate place for a brief survey of some other editions of the Irish Land Act. Those edited by Mr. W. G. Brooke and Mr. Donnell have already been reviewed in the columns of this journal. The former (Mr. Brooke's) is the most concise and practical edition of the Act, while that by Mr. Donnell, being more recent, possesses the advantage of various notes of cases hitherto decided by the Land Courts. Still other editions have been published, or are promised. Mr. Hutton has printed, for the benefit of the farming class, the Act complete with forms and annotations, and the price of the entire, bound in cloth, being but a shilling, his work may claim to be the cheapest legal work ever issued from the press. Finally, Mr. Butt, Q.C., who in the stormy region of Irish political life may be said to wear the mantle of O'Connell, has for some months been engaged in the preparation of an elaborate work on the new law of landlord and tenant, which will of course

sum up all that can be said on the subject, with (presumably) a strong bias in favour of the tenant. It is understood that the publication of Mr. Butt's work is delayed by a very singular circumstance, which has upset the calculations of the Government, and has placed in the way of their land policy a stumbling-block, which only an Act of Parliament can remove. This was no less an event than an elaborate judgment delivered by Lord Justice Christian in the Appeal Court, which to a certain extent nullified and negatived the more important clauses of the Irish Land Act.

This remarkable occurrence made a greater sensation in the Irish Courts than anything that has happened for many a year. The facts may be briefly summed up as follows. The Landed Estates Court Act of 1858 gave the most extensive operation possible to the Statutory conveyance of land executed by that Court; and the other tribunals, including the House of Lords, have always upheld to the full extent the conclusive and indefeasible nature of the title so conferred. This escaped the memory of the framers of the Irish Land Act, when they drew up clauses conferring certain rights on tenants. Consequently when the Landed Estates Court was about to sell, *in re Lord Waterford*, a large estate in the hands of numerous tenants, those tenants very properly said—"Our rights will be destroyed if the land is judicially sold to a purchaser, and handed over to him by a conveyance which is by clearly established law a positive and final bar to every kind of claim not therein reserved." How it came to pass that the Landed Estates Court took a different view, and that the Lord Chancellor of Ireland, who together, with the Lord Justice, sits in the Court of Appeal, concurred in the view taken by the Court below, we cannot pretend to explain. Perhaps even the most upright judges may be insensibly led into a desire to uphold the policy of a new Statute which is passed by the whole strength, and which breathes the whole soul, of a great political party.

The Lord Justice Christian, however, took a different

view. He is no politician, and cares nothing for Mr. Gladstone and his policy. He is simply a consummate jurist, possessing a far deeper knowledge of real property law than any of his contemporaries in Ireland. Probably, Lincoln's Inn has never produced a mind more thoroughly qualified to grasp a question of the kind; and it can hardly be supposed that his opinion was erroneous. Like Lord Westbury, the Irish Judge of Appeal is accustomed to express himself in singularly incisive and sarcastic language. Here was an opportunity, which was not neglected. The new law, and its framers, came in for a bitter castigation, to the intense amusement of an overcrowded court. This *bouleversement*, which threatened to render the new Act a dead letter in all cases of conveyance under the Landed Estates' Court, cannot yet be regarded as past history; for the solution of the difficulty is not yet accomplished. Lord Cairns indeed hastily framed a short Bill for re-instating the Irish tenantry in that position which it was the object of the Land Act to place them in, or, in other words, for giving effect to their claims against any person holding under a Parliamentary title: but it is easier to introduce than to pass an amendment Bill; and Mr. Butt, Q.C., and many other friends of the Irish tenant are making great efforts to enlarge its scope, by remedying other real or fancied defects in the original measure. No torpedo exploding beneath a man-of-war at anchor could possibly cause greater alarm and surprise than did Lord Justice Christian's judgment *in re Waterford*. Therefore do we feel justified in assigning to it a very prominent place in the literature of the Irish land question.

Reverting to the publications of the last year, it is necessary to allude, however cursorily, to the excellent volume of carefully written essays on the general land question, which was published under the auspices of the "Cobden Club." Any one who wishes to obtain, with little trouble, a comprehensive notion of the land systems of France, Belgium,

Germany, India, cannot do better than study the volume referred to, which is one of the best instances extant of the advantage of a combination of several writers in a common literary undertaking. Looking into the future it is impossible to doubt that the questions suggested by Mr. C. W. Hoskyns, in his thoughtful essay on the land-system of England, will anxiously engage the minds of all statesmen not many years hence. It is to be wished that Mr. Hoskyns would pursue the train of inquiry, and take up some collateral and connected questions, which are too much neglected. It is rarely that a man of competent knowledge can be found, willing to devote his attention to an inquiry at once abstruse and unremunerative.

It remains to glance at two of the most recent publications on the Irish land question.

Under the title of "Land Tenures and Land Classes of Ireland" are reprinted, with additions, some contributions of Dr. Sigerson to contemporary journalism. The author has, with great research and industry, traced back to very early days, all the facts which have tended to produce the land-system of our own day. Although not a member of the legal profession, he has largely illustrated his argument, which is decidedly in the interest of the tenant-class, by means of Acts of Parliament and other legal records of the past. He may perhaps have exaggerated the power of the landowners, and the degradation of the rural population in former years; and we are not certain that it is a beneficial or hopeful study, which shall vividly remind the Irish Celt of to-day of all the injustice and hardship suffered by his forefathers. The "social peace" which Dr. Sigerson hopes to promote would be rather helped forward by a policy of hatchet-burying, and by a general consent that all the main sources of national misery and discontent shall now be forgotten. It is, however, impossible to withhold a due recognition of the accuracy and intelligence which mark the pages of the historical sketch before us, the chief

value of which for English readers will be that it explains the origin of all the agrarian confederacies which have from time to time disturbed the peace of Ireland.

Mr. Donnell, whose edition of the Land Act has already been referred to, has just issued a small pamphlet, entitled "Farmers their own Landlords," with a view of explaining, to those whom it may concern, those clauses of the Land Act which relate to the purchase of farms. The clauses in question are believed to owe their origin to Mr. Bright, who was strongly impressed with the want in Ireland of a farmer-proprietor or yeoman class. Unfortunately he was unable to mature and guide his well-intentioned scheme. The portions of the Bill which related to the purchase of farms were very hastily and imperfectly framed; and they in effect left almost everything to be arranged by rules and regulations, which (as finally issued) are very far from giving effect to the intentions of the Legislature. It is evident, moreover, that very small transactions ought to have been committed by the Act to the local courts, working rapidly and inexpensively. As the matter now stands, no farmer can purchase up his own farm without the costly formality of a suit in the Landed Estates Court.

This proceeding will in every case involve an expense which may much exceed, but cannot fall short of, fifty or sixty pounds, and which must occupy several months. This portion of the plan calls loudly for amendment; being, in fact, almost inoperative. Owing to the formalities which now beset the purchase of interests in land, not more than ten or twelve applications have been made for purchase under the Act. A careful consideration of this branch of the subject will lead to the following conclusions:—Small purchases ought to be carried out under the supervision of the County Court judge, and the title of the new proprietor ought to be inscribed in a local registry. A general power of appeal and rectification might properly be given to the Estates Court in Dublin. Without these amendments, the "Bright clauses" of the

Land Act, neutralized by the dilatory and highly formal procedure of the Estates Court, are likely to remain a dead letter.* Mr. Donnell's views on this, as on other points, show that he has not written without very ample knowledge and the exercise of a sound judgment.

* As a matter of fact, only an insignificant fraction of the sum of one million sterling, authorised by the Act to be advanced by way of loan, in aid of these farm-purchases, has been so applied.

DIGEST OF SCOTCH CASES ON QUESTIONS OF GENERAL APPLICATION.

5 March, 1869.—*Sir Hew Pollock, Bart., v. Glasgow Water Company.*—41 *Jurist*, 325.

PUBLIC COMPANY (8 & 9 Vict., c. 19) LANDS CLAUSES CONSOLIDATION.

Held, by Lord Manor that on an application to uplift money and to pay off a bond of provision, the Company were bound for the cost of the warrant, but not for the discharge of the bond. The Lord Ordinary referred to English cases—*Oxford Railway Company*, 27 Beav., 571.

6 March, 1869—*Lawrent v. The Lord Advocate.*—41 *Jurist*, 329.

REPARATION—LANDLORD AND TENANT.

IN an action for damages sustained in the business of a Restaurant in Edinburgh, in consequence of operations done on the property by the landlord, the presiding judge (Lord Ormisdale), directed the jury that the pursuer must prove that the defender's works were in themselves improper or illegal, or executed with negligence, recklessness, or unskilfulness. The jury found for the defender. On a bill of exceptions, the Court (Lord Deas dissenting) sustained this direction. Per Lord President (Ingليس)—“There must be faults, or, in other words, delinquency or wrong, on the part of the defender of such an action of reparation to render him liable in damages.” Per (Lord Deas)—“The case before us is between landlord and tenant—parties who are directly bound to each other by mutual obligations. I am therefore driven to hold that the kind of wrong in the issue is that legal wrong which is done to a tenant where the landlord's operations not being unlawful in themselves could not be interdicted, and the wrong consequently consists not in the thing done, but in the refusal or failure to make good the loss, which these operations have caused to another.”

11th March, 1869.—*Pochin & Co. v. Robertson.*—41 *Jurist*, 334.

SALE—DELIVERY.

A PURCHASED a quantity of iron which he allowed to remain in the general stock. A employed B to find a purchaser and gave him an order of delivery. B raised money from C, to whom he gave the order and who got delivery. B became bankrupt. In an action by A against C—*Held*, that C was entitled to hold the iron for reimbursement of his advance, but bound to account to A for any balance after his own claim was satisfied. Per Lord President (Ingليس).—“If a creditor in return for his advance receives a transfer of property, or an assignation of a debt or personal obligation of

any kind, in terms absolute and unqualified, such as would be employed in a transfer to a purchaser of the property, or right of credit, he has all the powers of a proprietor or absolute assignee, for the purpose of enabling him to recover his advances. No doubt he is bound to account and recover whatever remains after satisfying his just demands."

15 March, 1869.—*Miss Murray's Trustees*.—41 *Jurist*, 343.

TRUST—JURISDICTION.

A TESTATOR left funds for a charity, with the provision that the parties should annually apply to the Court to have their accounts audited, and which should be held a discharge by the trustees. The Court refused to exercise the power (Lord Deas and Ardmillan dissenting). Per Lord Justice Clerk (Moncrieff).—"We certainly have no such power to originate inquiries into the management of trusts as the Court of Chancery possesses. As to all trusts, if the trustees decline to act, we possess and exercise the power of removing them and regulating their administration. Should that emergency occur in the present case, it will be time for us to interfere." Per Lord Deas—"The Court of Chancery no doubt has more available means and facilities than we have for explicating the guardianship of charities, but our duty, so far as we have the means of carrying it out, is the same. To sustain our jurisdiction in an application like the present is not, as has been said, to hold that a private party can confer jurisdiction. It is the law that has conferred on us the jurisdiction and imposed on us the duty of exercising it."

18 March, 1869.—*Thomson v. Gordon*.—41 *Jurist*, 347.

MINERAL LEASE.

A LEASE of coal provided that the lease was to end on the coal being worked out. Held in an action for arrears of rent that the tenant was liable, having taken no means to ascertain that the coal was worked out. Per Lord President (Inglist)—"It is not a relevant defence to a demand for rent to say that prior to a certain date the coal was worked out, or was unworkable to profit, while the tenant continues silent, and without taking the steps incumbent on him to have this ascertained, if he wished to found upon the clause of his lease as an answer to the demand."

18 March, 1869.—*Mrs. Hall and Others*.—41 *Jurist*, 357.

TRUSTEES.—30 & 31 Vict. c. 97, sec. 12.

A DOMICILED Englishman conveyed his whole property to trustees by a deed in English form. The trustees invested the greater portion of the funds on land in Scotland. The Court of Chancery appointed new trustees with powers, on the assumption that the appointment only applied to the funds in England. The beneficiaries applied to have the same persons appointed by the Court of Session

for the Scotch estate. *Held*, that the case did not fall within the Trust Act, and application refused. Per Lord President (Inglis)—“There is a distinct appointment of trustees by a court of competent jurisdiction, and it does not appear to me that it can be supplemented or made more effectual by any action that can be taken by the Court so far as the office is concerned.” “The trustees appointed by the English settlements were capable of acquiring or holding landed estate in Scotland, and the gentlemen appointed as trustees by the Court of Chancery are quite as capable of holding landed estate in Scotland, and all that they require is to make up a title to the property.”

19 March, 1869.—*The Steam Tug Company v. McClew and others*—41 *Jurist*, 378.

SHIP-DEMURRAGE.

By contract for towing a vessel from one port to another, demurrage was provided for at so much a day, unless the detention was from stress of weather, or from accident, to be paid for at same rate. In a gale the tug's hawser fouled without any fault on the part of the crew of the tug. Both vessels in consequence had to be detained in an intermediate port. *Held* that demurrage was due (Lord Ardmillan dissenting). Per Lord Deas—“The separation was an accident in the purest sense in which the term can be applied to any occurrence. It was the result of circumstances which no one could avoid or prevent. It was as purely so as if the tug had been struck by lightning; and it appears to me that, as respects an accident of that kind, the word ‘accident’ is to be read in the contract as applicable to both vessels.” Per Lord Ardmillan—“The contract is for towing of the ship by the tug. If the tug cannot tow because she has met with an accident, that is her misfortune, and I can scarcely think that the detention caused thereby can be charged against the ship which was not tugged because of the accident. Equity must govern our construction of the contract, and I do not think the pursuer's construction equitable.”

20 March, 1869.—*Jenkins v. Robertson*.—41 *Jurist*, 386.

PUBLIC RIGHT OF WAY—SECURITY FOR EXPENSES.

AN action being brought in names of three individuals to declare a road to be public, on a proof of their indigence the Court ordered the pursuers to find security for costs. Per Lord Ardmillan.—“It would be a libel on the law of the country if there were no means of stopping such injustice. I have looked at some of the English cases, and I find they go to this, that where there is a person in such circumstances that notoriously he cannot pay costs, and they find there are others behind him who have an interest sometimes higher than his, and sometimes only common with his, they do not turn the plaintiff out of court, or compel the other party to come forward, but they simply find that there must be security for costs.”

23 August, 1869.—*Special Case.*—*Muir's Testamentary Trustees.*—42 *Jurist*, 25.

TESTAMENT—PENCIL CODICILS.

ON the death of a party, a formal testamentary deed of settlement was found in his repositories with two codicils added in pencil of different dates. The court held the codicils valid. Per Lord Cowan—"That the writing is in pencil is an important element in the inquiry, whether a holograph addition to a settlement ought to receive effect as testamentary, or whether it is to be viewed as deliberative only? But if it be truly testamentary in its nature and terms, so as to entitle it to that effect had it been written in ink, I cannot hold that its being written in pencil destroys its validity. Now the writings in this case are in their terms testamentary, they are both of them subscribed by the testator and dated by him, and being holograph they are probative writs by the law of Scotland. Hence there being no circumstances in the case to show that they must have been written merely as deliberative, effect cannot be denied to them on the mere ground of their having been written in pencil. This view is, I think, not less consistent with the principles of our own law than with the decisions which have been pronounced in the English Courts, the import of which will be found accurately summarised by Mr. Williams in the first volume of his work on Executors, p. 106, 6th edition."

29 October, 1869.—*Stewart v. Caledonian Railway Company*—42 *Jurist*, 38.

JURY TRIAL—CONTRADICTORY VERDICT.

A JURY found a verdict for the pursuer that he had suffered serious injury and damage by fault of the defenders, but assessed the damages at one shilling. The court held the verdict self-contradictory and irrational, and that there being thus a miscarriage of justice, ordered a new trial.*

27 October, 1869.—*Baillie v. Baillie.*—42 *Jurist*, 38.

TRUST—SPECULATIVE PROFITS.

MARRIAGE trustees unauthorisedly invested the funds in bank stock which realised a large profit. *Held* that the profits could not be claimed by the spouses, who had the life rent interest in the fund, but added to the capital the whole beneficiances were entitled to participate therein. Per Lord Justice Clerk (Moncrieff):—"I hold it to be a well established principle in law that if trustees make a speculative investment, from which benefit accrues, the benefit must go to the whole beneficiances in proportion to their respective interests. There is not much authority on the subject, but the principle is unquestionable, and has been repeatedly applied in cases

* A subsequent jury awarded £200.

where trustees have improperly, though advantageously, allowed trust money to lie in trading partnerships."

30 August, 1869.—*Oliver v. Robertson*.—42 *Jurist*, 41.

CAUTIONER—WITHDRAWAL.

A BANKRUPT having found judicial caution for costs of suit, the other party prevailed on the cautioner to withdraw his surety. *Held* that the party could not demand fresh caution. Per Lord Neaves.—"A litigant is entitled to go to the cautioner before the bond is lodged, and he must presume to be satisfied of the cautioner's solvency; but when the bond is lodged he ought to keep entirely aloof, and to do nothing that can have the effect of inducing him to withdraw."

5 Nov., 1869.—*Glasgow Jute Company v. Carrick*.—42 *Jurist*, 45.

COMMON INTEREST.

WHERE ground was feued out under condition of a space being left for a street, but that the street should not be opened until, nor carried further than, the superior thought proper. *Held* (1st), that the feuars could enforce the clause against each other. (2ndly) That the reservation could not authorise the superior to give right to a feuar to build across the street and stop further traffic. Per Lord President (Ingليس).—"The feu rights are all complete, and every feuar has a right against his neighbour to enforce the formation and maintenance of the street. The reservation is in favour of the superior as superior, and not an obligation that can be transmitted to any one that is not the superior."

6 Nov., 1869.—*Smith, Payne, and Smith v. Rischmann*.—42 *Jurist*, 48.

BANKRUPTCY—FOREIGN.

A FOREIGNER residing in London, being insolvent, came to Scotland, and a sequestration of his estates was there obtained. He had no creditors or assets in Scotland. The majority of his creditors in value were abroad and the rest in England. A petition for recall of the sequestration was refused (Lord Deas dissenting). Per Lord President (Ingليس).—"What the Legislatures have said (23 & 24 Vict., c. 33, s. 2) is, that this court may recall a sequestration where the majority of creditors in number and value are resident in England or Ireland. Now most assuredly in this case there is not a majority of the creditors resident in England or Ireland, or both. The majority are resident out of the United Kingdom." Per Lord Deas.—"I think the application for recall is competent, and that the provision of the Statute as to a majority of creditors, has reference only to a majority in one of the three divisions of the United Kingdom, and not to creditors abroad."

6 Nov., 1869.—*Crawford v. Magistrates of Paisley*.—42 *Jurist*.

BURGH—PUBLIC PROPERTY.

MAGISTRATES resolved to remove a public steeple as being in a dangerous state, which was denied. An inhabitant obtained an interdict (injunction). Per Lord President (Inglis).—"This steeple, and clock, and bell, are the property of the community, I mean that large municipal corporation which embraces the whole inhabitants of Paisley, whose administrators the magistrates and council are. It is their property in this higher sense that the administrators cannot alienate it. They have no power to sell or dispose of it, and it appears to me to follow that they cannot, under ordinary circumstances, pull it down any more than they can sell it. Of course a case may arise where the magistrates, as the proper administrators of the property, would be doing their duty in having a building removed on account of its being dangerous, or for some other sufficient reason, but it may well be doubted if an act of that kind is one of ordinary administration, and can be gone about *de plano* without any authority whatever, and just because it appears to the magistrates that they can effect a widening of the street, and make a favourable arrangement with adjoining proprietors."

9 Nov., 1869.—*Harvey v. Gordon*.—42 *Jurist*, 60.

COMMON PROPERTY.

Two lots were feued, one with the provision that a sufficient wall should be built between, at the mutual expense, not to exceed eight feet in height without consent, and in no case to exceed ten feet. One of the feuars, without consent of the other, built a wall to the height of six and a half feet with a coping. Held that he could not subsequently, at his own hand, raise it to eight feet. Per Lord Justice Clerk (Moncrieff).—"The party built this wall partly on the adjoining feuar's ground, and put a cope stone thereon. I am of opinion so soon as that was done, and the wall thereby finished, it became a mutual wall, and from that moment one of the *pro indiviso* proprietors could not operate upon it without the consent of the other."

H. B.

Notices of New Books.

[** It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

Notes to Saunders' Reports. By the late Serjeant Williams, continued by the Right Hon. Sir Edward Vaughan Williams. In two volumes. London: Stevens & Sons. 1871.

WE are much gratified to find that Sir E. V. Williams has been able to devote his well-earned leisure to the preparation and publication of what is substantially a new edition of "Williams' Saunders." Instead of the old text of "Saunders' Reports," which contains so large an extent of what is now useless matter, we have here an abridgment of the several cases, to which the old notes are applied. The pleadings also are omitted, as entirely without value in the existing state of the law. The present work is in fact an adaptation of "Williams' Saunders" to the law as it now exists; and this is effected in a manner advantageous for practical purposes, but without rendering less solid the learning which is here so amply displayed. Mr. Serjeant Williams published the first volume of his edition of Saunders' Reports in 1799, and the second volume in 1802; a second edition by the same learned editor appeared in 1809. In 1824, Mr. Patteson (afterwards Mr. Justice Patteson) and the present editor brought out a new edition of the same work, and in 1845 the latter published another edition of it. The present publication is a new edition, with the modifications we have mentioned, of the same great work, and we have every reason to believe that it will be as useful to the lawyers of our own generation as former editions have been to their predecessors. The law has no doubt been greatly changed since "Williams' Saunders" first appeared, but we have here all the changes noted and commented on. In adapting to the present state of the law his father's learned and admirable work, Sir E. V. Williams has not only hereditary right in his favour, but possesses every qualification which such a task demands. His ability as a jurist has been long acknowledged by every member of the profession, and his skill as a practical lawyer are equally admitted by all who knew him at the Bar or on the Bench. We feel fully justified in tendering to him the best thanks of the profession for the care which he has bestowed on the present work, and for the valuable learning which he has here produced for the benefit of the common lawyers of the present day. In any form

"Williams' Saunders" must always be considered as a great store-house of Common Law learning, but the present work makes it available in a manner which all, who are accustomed to have recourse to its treasures in every case which requires more than ordinary consideration, will fully appreciate. Our present remarks are only intended by us as introductory to a fuller estimate of the great work now before us, and to some views with respect to our legal system suggested by it, which we hope on an early occasion to present to our readers.

The Medical Jurisprudence of Insanity. By J. H. Balfour Browne, Esq., of the Middle Temple, Barrister-at-Law. London: J. & A. Churchill, New Burlington-street. 1871.

THIS work is the production of the son of a late Commissioner in Lunacy, and is "inscribed" by the son as a tribute of affection to his father. Mr. Browne has certainly won the palm of assiduity; he has also, purposely, we think, contrived to mitigate the gloom of his subject by the always cheerful, and often facetious, way in which he states a case, remarks upon an opinion, or communicates a suggestion. Whether or not the author claims descent from Sir Thomas Browne, we do not know; but we know his book presents, at all events, many of the idiosyncrasies and pleasantries of that great physician. The present author is, however, a barrister, and his book is a "practical treatise" intended for the lawyer and the physician, whose too frequent differences of opinion in questions of civil capacity and criminal responsibility the author hopes it may tend somewhat to reconcile. It is incumbent upon us, therefore, to look into the substantial contents of the book, and its utility for the legal profession, before we assign to it unreservedly that high praise which its general purpose, its general tone, and its more superficial features incline us to award to it.

The subject, it will have been observed, is one definite (if not well-defined) head of medical jurisprudence; and by isolating it from the very numerous matters which are the usual subjects of medico-legal jurisprudence, the author has rendered his treatment of it at once complete and systematic. After introducing his subject in a general way in the first two chapters of his work, he proceeds in the third chapter to lay down—not perhaps a definition of insanity, but such a description of it as will serve the purposes of his treatise, which are also the purposes of practical life; and in setting about this task, he very wisely and characteristically says,—“Before it is possible to clearly understand the meaning of the term unsoundness of mind, it is perhaps necessary to understand what is meant by the term sanity. A deviation can only be appreciated when that from which it is a deviation is known.” Then, after having arrived at his final definition or description,—a description which seems almost to apply to our own customary eccentricities,—he goes on to state that “some classification of the various kinds of mental diseases is

absolutely necessary ;” and he proposes accordingly to distribute them under two heads—namely, (1.) “Those which are dependent on arrested development” ; and (2.) “Those which are due to some functional derangement or organic lesion occurring or occasioned subsequently to full normal development.” This primary division certainly commends itself to our minds, and the distinction which the author makes it the basis of is a distinction which agrees entirely with the occasional facts which have come within our own experience,—namely, that defective energy is the characteristic of the former class, as undue activity is the characteristic of the latter one. The latter is perhaps the more familiar of the two, being in fact (as the author points out) *mania*, both in the technical and in the general acceptance of that term ; but the former is a species of insanity which it is not less imperative upon the legal or medical practitioner to regard than is the latter one. The former species of insanity is sub-divided by the author into (1.) *Amentia*, and (2.) *Dementia* ; and again, *Amentia* may be either *Idiocy* or *Imbecility*, and both *Idiocy* and *Imbecility* may be either general, intellectual, or moral ; while again *Dementia* may be either *Premature* or *Senile*, according as it is the effect of accident or other occasional cause in the vigorous period of life, or of that general decay which is the usual accompaniment of increasing years. Altogether the author’s divisions and sub-divisions are not only consistent in respect of logic, but also agreeable to the reality of fact. The author, besides treating of these forms of permanent or quasi-permanent insanity, has interposed a few chapters upon those occasional or intermittent forms of insanity (as he would call them) or of eccentricity (as we should call them) which show themselves in epilepsy, somnambulism, drunkenness, delirium, and aphasia ; and proceeds in the next place to treat of feigned insanity, of concealed insanity, and of lucid intervals, concluding his treatise with three chapters of a more monitory and general sort, in which he discusses the admissibility of the evidence of the insane, the prognosis of insanity, and the best mode of dealing with insane, or alleged insane, examinees. The author seems also to have kept up a constant watch for cases, incidents, and opinions the most recently occurring which seemed to have any bearing on his subject. *Mordaunt v. Mordaunt* finds due mention from him, and even the incidents which the *Echo* for May last mentions to have occurred at Sheffield, find mention in their proper place in our author’s work with a due and courteous acknowledgment from him of his source of information. The book is as interesting as it is instructive, and it will also be as useful as it is complete and systematic.

The Handwriting of Junius professionally investigated. By Mr. Charles Chabot, Expert. With preface and collateral evidence by the Hon. Edward Twisleton. London : John Murray. 1871.

SIR WALTER SCOTT mentions a hare, the death of which caused a coursing club to be broken up. It had given the members many a

good hunt, but at length its time was come. It was caught, and with it the club ceased to have any reason for existence. In the same way, the question of the authorship of Junius has given rise to fine tracking and to good sport, but at length we think it must be conceded that the sport is over. Dead, was the verdict with most when Macaulay led the hunt. But there was yet life remaining. Dead as a door nail, will, we think, have to be the verdict now.

Until the publication of the work which is now before us, a considerable number of people were of opinion that the question of the authorship of the letters of Junius would have to be left as unsettled and as incapable of solution as the character of Mary Stuart. Most readers of Macaulay were inclined to believe that he had settled the question as far as it could be settled. He had pointed out five points of resemblance between the author of Junius and Sir Philip Francis, which it was impossible to suppose could have occurred unless the two were one. He showed that Junius was some one who was acquainted with the technical forms of the Secretary of State's Office. Sir Philip Francis was. He pointed out that he was intimately acquainted with the business of the War Office. Francis was a clerk in that office. He made it clear that the author attended in 1770 the debates in the Lords, and took notes of the speeches, and especially of those by Lord Chatham. He showed that Francis so attended. He pointed out that Junius bitterly resented the appointment of Chamier to the place of Deputy-Secretary of War, and that he was bound by some strong tie to the first Lord Holland. Francis answers to these tests also. But the strong point of Macaulay's argument is, that no other person can be named who answers to all these tests. Mr. Herman Merivale adds to this argument, that it is impossible to find any man capable of the style of writing, in which the letters of Junius are written, who could have stood these tests.

For ordinary mortals, the evidence furnished by these authors was amply sufficient. But there are sceptics on every subject. An unfortunate gentleman the other day wagered 500*l.* that the earth was not round, and we are happy to say lost his bet. And so, too, there were those who doubted after all whether Francis were the author after whom they were in pursuit. To such, the evidence afforded by this book ought to be conclusive. In the first place, it is to a certain extent an entirely new species of evidence. It is the evidence as to handwriting. And here let us say that the book will do much to raise the evidence of experts as to handwriting in the estimation of the public. There has been an impression abroad that far too much deference has been paid to the evidence of self-constituted experts. These men have made a mystery of their profession, and the age objects to mysteries, believes that even the secrets of freemasonry are just no secrets at all, and is inclined to think that mystery is either a cloak for ignorance or imposture, or for both. In this book, however, we have not merely the results arrived at by the two leading experts of the day, Mr. Chabot and Mr. Nethercliffe, but we have the whole train of reasoning given by which they have arrived at these results.

It is hardly too much to say that with the reasons given by the two experts for the conclusions at which they have arrived we are almost made as capable of judging as the experts themselves. One of the most noteworthy differences which strikes an observer between the handwriting of Junius and that of Francis is that the slope of the writing is altogether different. The general resemblance of the two hands is striking. They are both remarkably good hands, but the general style is the same. Of course it may be replied, and with truth, that the several periods of English history furnish distinct styles of penmanship, and a general resemblance only goes to show, what no one disputed, that Francis and Junius lived at the same time. The difference in slope, of course, would, in ordinary cases, indicate that the writers were different men. But, if we remember that the author of Junius, whoever he was, wished to conceal himself, we may naturally conclude that a difference in slope would be one of the means which he would adopt in order to prevent the recognition of his handwriting. The general excellence and the general resemblance of his handwriting would then be evidence to show that the author of the letters and Sir Philip Francis were the same. This resemblance was noticed years ago. But the experts show us that the writers had the same tricks of penmanship, the same accidental little habits into which each handwriting falls. Such tricks every man is liable to and is probably unconscious of. Take for example this test. Most people after the address and the name of the month, with which a letter is headed, omit to insert any stop, or they place a comma after the name of the place. Francis, however, never failed to insert a stop: usually he placed a full stop after the date of the month, a colon after the *th* of the month, and a full stop after the year. Thus he would write *London, 6th: March. 1771.* Exactly the same peculiarity is observable in the letters of Junius. Another distinctive resemblance between the two handwritings is that the *th* is always placed exactly over the figures instead of over it but a little on one side of it. The experts have taken nearly every letter in the alphabet, and by means of photo-lithographed plates show us that the points of resemblance are so many and of dissimilarity so few as to force to the conclusion that Francis and Junius were the same. Indeed they irresistibly lead to the observation that none of us have the power so to vary our hand as that careful observation shall not expose the attempt. To confine ourselves simply to the datings: Mr. Chabot shows nine points which are found in combination in the datings of Junius which are likewise found combined in the writings of Francis. These nine points are so very peculiar, says the editor, that although he has examined more than three thousand letters he has never seen those points united in any writer except Junius and Francis. Another among the very many points which are noted is the resemblance in the salutations. Let the reader remember his own and his friends' habit of writing 'Dear sir.' Some persons put a full stop after this phrase; some a comma, some few a semicolon, but the great majority put no stop at all. What is remarkable about

Junius is that he had the fixed habit of putting a full stop after his salutations. Forty-one out of forty-two of his letters have a full stop in this place. In the letters of Junius occur twenty-five salutations. In every case there occurs either a full stop or a line of separation, the latter occurring only in informal letters to the printer.

A curious piece of evidence occurs also in connection with obliterated words and dates. In many cases these have been carefully obliterated with the object of hiding the undisguised penmanship of the writer. In nearly every instance these obliterated passages are written at the usual slope of Francis. Every now and then, as might be expected in a man who was writing in a disguised hand, the writer fell into his usual style. Such words are usually erased, but under the microscope the word becomes clear, and wherever this is so, and the handwriting is not that of Junius, it approximates more closely to that of Francis.

The proof afforded by the evidence of the handwriting is so overwhelming, that if none of the arguments of Macaulay applied, we should still be bound to maintain that in the face of such evidence it was impossible that the author of the letters of Francis could be any one else than the author of the letters of Junius. We have great pleasure in commending this exceedingly curious and interesting book to those of our readers who either take an interest in the authorship of the famous letters, or are desirous of knowing what is the value of evidence deducible from a comparison of handwriting.

A Guide to Drawing Bills of Costs, &c. By Thomas Farries, Law Costs Draftsman and General Accountant. Third Edition. London: Thomas Farries and Horace Cox. 1871.

THE preface to this work bears date March, 1871, and introduces the present, or third edition, in order to give Precedents of Bankruptcy Costs required under the Bankruptcy Act, 1869, and under the County Court practice since the last Act.

There are certainly some useful precedents of Bills of Costs in this book, and the necessity of a reliable guide to the practitioner in this part of his business is clear, but after a careful perusal of the work before us, we observe several matters against its being considered as such a guide.

It is, we think, to be regretted, that the author did not find time to make his book what he describes it in the preface, "a New and Revised Edition of his Law Costs Guide." The work has neither table of contents nor index, except so far as a single leaf added to the end answers for index; but the least examination shows that the new edition consists only of the first 93 pages, being precedents of Bankruptcy cost, and the author's *proposed* charges for business in Liquidation cases. It is unfortunate for the writer that the authorised scale for such costs has at last appeared, and therefore deprives his proposed charges of most of their utility; still, on the whole, the work will be useful in several of its parts, especially the precedent

of Chancery costs in winding up cases under the Companies Act, 1862.

In proof of our opinion, that his work is not throughout a new and revised edition, we may refer to the fees in the Common Law costs, (page 142), where the fee on entering cause is omitted, although the reader is somewhat confused by the charges "previously to the rule of M. V., 1865," being fully set out and repeated, in referring to the Clerks of Assize. Worse still, in the precedent at page 240, the fee for entering cause is stated as £1 5s., although for several years it has been £2; thus shewing the absence of any recent revision. To test the value of this production as a *guide*, we have carefully scrutinized the bill of costs at page 87, in a cause "commenced in a Superior Court, and *transferred* and concluded in the County Court," and although unwilling to press hardly on the author, who is not a lawyer, but a general accountant, we must say this precedent is most confusing to us, and appears to contain more of the costs on a trial of issues in the County Court, under the 19 & 20 Vict., c. 108, than under the transfer pursuant to the County Courts Act, 1867, and should this precedent be relied on for practise under the latter, it must greatly deceive the embryo. Nearly a page of items of charge between appearance and issue is given, while under sec. 7, actions of contract can only be removed *by the defendant*, and within eight days after service of writ, and as we have an item "special endorsement of writ," the precedent indicates such an action, and is not limited to actions of Tort, remitted under sec. 10 of the Act of 1867.

The costs in conveyancing will be useful in offices until the simpler plan of *ad. val.* Commission, now recommended by the Incorporated Law Society, shall be tried. As advocates of all useful reforms, we should be pleased to see a more rational system of charge adopted than the mere *length* of documents, certainly the most unsatisfactory possible test of skill and ability.

- (1.) A concise view of Proceedings in, also, (2.) Notes on, Liquidations and Compositions under the Bankruptcy Act, 1869. By G. Manley Wetherfield, Solicitor. London: Longmans. 1871.
- (3.) A Practical Treatise on Liquidation by Arrangement and Composition with Creditors under the Bankruptcy Act, 1869, comprising the Rules of 1871. By Joseph Seymour Salaman, Solicitor. London: Stevens & Haynes. 1871.

THE Bankruptcy Act, 1869, has had scarcely two years as yet to operate; the rules of procedure under it have been issued from time to time at irregular intervals and have only now reached something like completeness or finality. In this condition of the law upon the subject, it is to be expected that the works of authors who attempt to methodise or to explain it, should present a like incompleteness or progressiveness; and this is more or less the characteristic of the volumes which are now before us, although in a much less degree of

the third of them, for Mr. Salaman has dexterously contrived to incorporate in his treatise the very latest rules and decisions in the matter, even the new rules which were only sanctioned so recently as the 7th ult., unintentionally stealing therein a march upon his contemporary and companion author, Mr. Wetherfield.

The Concise View and the Notes of Mr. Wetherfield are intended to be supplementary; and if it be true (as it is commonly and truthfully alleged) that the Bankruptcy Solicitor has only to "*pursue the Act*," we cannot imagine anything so good as the Concise View of Mr. Wetherfield for assisting in that pursuit, for it ensures that no steps, whether trivial or important, shall be inadvertently omitted in it. And although unfortunately the table of customary charges, careful and just as it is, has lost its principal value since the publication of the table of authorised charges in the rules of 1871, yet we think the Concise View so good in other respects not affected by those rules, that we confidently anticipate for it (more especially as it costs but a shilling) a large and ready sale, because a large and ready usefulness. The Notes which are supplementary to it will naturally share its wide acceptability, costing only 2s. 6d., and being not only explanatory of the Concise View, but possessing also independent merits of their own which cannot fail to recommend them.

The Practical Treatise of Mr. Salaman is, however, a formidable rival, being a thoroughly well executed book, outwardly attractive, inwardly complete, deliberate, and clear. The author is already favourably known to the profession for his "*Practical Guide to the Bankruptcy Law, 1869*"; and he has written this further volume upon a kindred subject, or, speaking accurately, upon a special portion of the same subject, with equal carefulness, with equal knowledge, and with equal judgment and perception. The particular occasion for the work was "the non-workable qualities" of the sections of the Act (125, 126) providing respectively for Liquidation and Composition. These qualities have required a succession of rules to mitigate their impractical character, and in the course of that gradual mitigation or removal there has meanwhile grown up "a kind of unwritten law," known only to those who have practically lived through its formation and assisted in it. Now the author has divulged these secrets, and in doing so has produced a treatise which, although statutory and formalistic in the main, is also judiciously historical and explanatory. And the author, omitting no element of completeness, has adduced all the cases (including those not yet formally reported) which have been decided upon and which tend to illustrate sections 125-6 of the Act, or the rules of procedure applicable thereto. We very heartily commend his work to both branches of the profession, and to the mercantile and trading public generally, as a happy medium between lengthiness and scantiness, and as a work which already reaches nearly to perfection in this the first edition of it, although written in a matter that is novel both in itself and in its nomenclature. Every page or paragraph of it indicates, in truth, in Mr. Salaman the full understanding of an experienced person and an adept. The table

of contents is also beautifully logical, and the index accurate and full. The cost of the book is *ten* shillings.

The Law of Marriage and Legitimacy, with special reference to the jurisdiction conferred by the Legitimacy Declaration Act. By Hugh Weightman, M.A., of the Inner Temple, Barrister-at-Law. London : Henry Sweet, 3, Chancery Lane, W.C. 1871.

MR. WEIGHTMAN is a barrister of nearly thirty years' standing ; he is also tolerably experienced as an author. It is, therefore, but a just expectation in us, if we require from him in his present work, both maturity of opinion and abundance of methodised learning. We should also expect from him, although with more hesitancy, some peculiar merits of style, whether perspicuity, simplicity, brevity, force, or other like commendatory qualities. And what do we find ?

We find in his preface (to begin at the beginning) much appearance of humility or modesty, which to our minds seems out of place in an author and barrister of his standing and experience. We find also much uncouthness, both of style and phrase, the result it may be of haste, the indication, however, it may also be (as we rather fear) of an imperfectly cultivated style. It is particularly distasteful to find, for example, the expression "*antipodean* ! colonies" used by the author on p. 7, to denote our remoter colonies or settlements ; it is also particularly harsh upon the ear, and ungrateful to the understanding, to stumble against such a hitch or chasm as that which occurs in the following sentence, where speaking of his work, he says—"Such as it is, the author launches it upon the stream of public, and especially of the legal public, opinion with much diffidence." Now, for our own selves, knowing as we do so well that the dexterous use of words, and the nice adjustment of the clauses of a sentence, constitute, in fact, the better part of an author's knowledge, or of a barrister's legal value, we were really discouraged to proceed with Mr. Weightman's book further than the preface, in this hot weather, in which we found so many stumbling blocks. But we proceeded. And proceeding with the work, we found the *medias res*, or substantial portion of it, not calculated in any especial way to compensate for these more glaring defects of style, or form appearing in the preface. It is really an ungracious thing to despoil an author of the trophies which he fancies he has won, or to prevent "the public, or more especially the legal public," from awarding him the honours which, but for our detraction, they would or might have done. But really we value *veritas* before *amicitia* ; and more especially we feel called upon to reprobate the inconsiderate haste, if not also, or rather, the chaotic tumult, which is the principal characteristic of Mr. Weightman's volume. It is destitute of everything like order, either natural or rational, abounding in instances of the most vulgar species of *hysteron proteron*. The phrase "of course" occurs in it every third page or so, and is always improperly used, and the phrase "at all events," is used with a like frequency and

gaucherie. The author has shown an utter neglect of, if not also an incapacity for, art; he has raised no rule or principle into prominence or relief; the very title of the book is scarcely justified by the contents of it. On p. 5, the author, after a rambling general statement of the policy of marriage laws, proceeds to state—“*Such being a sketch of the objects of the present work*, the remainder will be devoted to an elucidation,” &c. Now really he has given no such sketch at all, on any, or all of the four preceding pages, and we never, speaking candidly, were so much astonished as when we read this connecting paragraph, for it is about the rudest specimen of dovetailing we ever met with. It is our sincere belief, that the author knows his subject most imperfectly; and to quote a phrase of his own, it might not be “unedifying” for him to study and to understand the Legitimacy Declaration Act, before he attempts to comment upon it. Almost the only valuable part of the book which we have been able to discover is the summary which is given on pages 50-52; this portion of it is so different, in all respects, from the rest of it, that we sincerely wish the rest of it had been like it. If “the public, and more especially the legal public,” will, in these hard times, give 9s. for these two pages of good matter, then this book will sell, and Mr. Weightman may, in the next edition of it, have an opportunity of regaining our good opinions, by re-casting the whole method, and re-distributing the whole materials of his work; but if it should prove otherwise, then we hope that Mr. Weightman’s merited neglect, may teach both himself and others ordinary prudence and consideration. We imagine the chaste, and even somewhat restrained, genius of Lord Penzance, is not much flattered by Mr. Weightman’s dedication of his work to it.

The Statutes: Revised Edition. Vol. II. William & Mary to 10 George III., A.D. 1688-1770, by Authority. London: Eyre & Spottiswoode, Her Majesty’s Printers. 1871.

ADMIRABLE! is the exclamation of the lawyer, as each successive instalment of this work is presented to his notice. The rapidity with which the work is proceeding, the carefulness with which it is being done, and its substantial qualities in all respects, promise to speedily relieve the practising barrister of much of the labour and perplexity which he at present feels in advising upon cases falling within the domain of the Statute Law, and they will also furnish the lawyer of the future with one means of economy at the least, to compensate for his alleged diminished earnings, condensing as they do, or promise to do, within a few portable volumes, the two score and more of volumes which at present contain our Statute Law.

Finality is, however, beyond the reach even of the gentlemen who, in so praiseworthy a manner, are carrying out this work of the revision of the Statutes, they having proved unable, for an obvious reason, to indicate in the present volume the effect of any repeals

made subsequently to the Session of 1869-70 ; at the most, therefore, they have succeeded in furnishing a new and authoritative starting point for the revision committee of some future century. But this consideration is of interest only for the generations of the future ; of their own generation, the present revisers have deserved and are deserving well.

We have little to note in particular of the present volume, pursuing as it does the same general rules and arrangements as described in the introduction to the first volume. The plan is to print all the public Acts not actually repealed, except those virtually repealed by subsequent operations. We may, however, remark, that as the revisers come nearer and nearer to our own and the more recent reigns, their work becomes more and more arduous for them, and the Statutes become less and less readily assortable in simple and unqualified arrangements. For instance, the union with Scotland in 1707, a year which is comprised within the present volume, had at the date thereof, and has also subsequently, had effects upon our legislation which it is indispensable in a work of authority and of completeness to discriminate or distinguish ; and the compilers have not shrunk from this labour, but it is evident that the consequence of having to make any such distinctions is to render this second volume more complex. We can, however, point out no omission or error in it ; and to criticise the intrinsic merits of a work so vast, is too laborious, if not impossible, for us.

A Contribution to the Discussion on the Amendment of the Law of Entail and Settlement. By T. T. Ford, of the Middle Temple, Barrister-at-Law. London : Stevens & Sons. 1871.

OF this little pamphlet, with its modest title and most valuable suggestions, it is impossible to speak too highly. Starting with the assumption that all laws are bad which encourage or assist the creation of perpetuities, the writer proceeds to point out how this is done by the law of entail. He is clearly of opinion that neither the law of primogeniture nor the rule restraining perpetuities can be held in any way to contribute to this result. Seeing that the rule against perpetuities applies as well to personalty as to realty, Mr. Ford makes the obvious remark that "it is not certainly to a rule operating so smoothly in one direction that we should *primâ facie* turn for the source of a great evil in another." He accordingly refers the evil to the Statute *de Donis Conditionabilis*, which is the origin of the system of perpetual entail. He considers that by the system of barring entails, whether, as formerly, by fines and recoveries, or, as at present, by disentailing deeds, the snake was scotched but not killed. The establishment of "protectors to the settlement" by the Fines and Recoveries Abolition Act, in 1833, he considers to have been a retrograde step, still further lessening the chances of free alienation. The manner in which the present system operates in favour of perpetuities is well pointed out in

pages 11-13. In the latter part of his pamphlet, having advocated the repeal of the Statute *de Donis*, or, at least, that an Act should be passed forbidding the creation of estates tail, he proceeds to the objections which may be urged against his scheme, which he considers may be sufficiently met by the extension of the rule against perpetuities from lives in being and twenty-one years, to lives in being and twenty-five years. This would enable parents to extend the age at which the children of their marriage shall have control over property from twenty-one to twenty-five years, an age at which there would be a reasonable security that the value and responsibilities of property would be understood. Mr. Ford refers to the Roman law, under which a *minor*, up to the age of *twenty-five*, was entitled to the appointment of a curator for the management of his property.

We have no hesitation in saying that Mr. Ford's pamphlet should be read by every one who takes a practical interest in the subject. In these days of ignorant declamation on various matters which take the popular fancy, and not least on this subject of the law of entail and settlement, it is refreshing to read the really valuable and instructive suggestions contained in the present pamphlet.

The Law School of Harvard College. By Joel Parker. New York : Hurd & Houghton, Cambridge, U.S. 1871.

OUR American cousins have so much young, unshapen feeling in them, that they are apt to disturb our older and more chastened senses with the semi-comic trumpeting with which they in general herald their arrivals. Mr. Joel Parker on the present occasion hailing from New York, first sings a doggerel from "Truthful James," an overland brother of his own, and then justifying himself with the spiritual motto of St. Paul—"So fight I, not as one that beateth the air," he steps boldly in amongst us with news from the west about the school of law at Harvard. He asks our attention at the outset to "some matters pertaining to the history of Harvard College," and he explains that he is "impelled to this course by two publications" (mentioning them), which he says contain grave and unmerited charges upon the honour of his *alma mater*. No wonder therefore that we thought him something flurried and unusual in his manner at the first.

It appears from page 5 of Mr. Parker's vindication, that the responsible editors of one at least of the virulent publications are understood to be "two young men who about four years since consented (*sic*) to receive the honours of the school in the shape of a degree of Bachelor of Laws, without insisting upon a preliminary examination to show that they deserved them." Surely 'their conduct, therefore, is most ungracious and unthankful. But the author alleges it is worse, and that the statements contained in both the two publications are also false and untrue in fact; and it is their falsehood and untruthfulness which Mr. Parker has taken up the cudgels to knock down or give a beating to.

Mr. Parker, we ought to mention, has been Senior Professor and Head Master (to use an old-world phrase) of Harvard for over twenty years; and he may therefore naturally be supposed to have an interest (both public and personal) in her reputation. Indeed his interest in these respects, or in one of them, is so great that it has "impelled" him, contrary to the better wisdom of his advisers, to rush into print with this long vindication of fifty pages, AND an appendix. Unhappily, we ourselves are not a jury, either by nature or by authority, to interpose or to adjudicate in the matter between the alleged maligners, and the alleged maligned; and verily therefore he doth beat the air, for anything that we in England care.

Regarding the pamphlet, however, apart from the immediate occasion and immediate object of it, we think that in itself, and in the information which it contains, it may be valuable in some small measure to the judicious and honourable committee (and the officers thereof) who are at present endeavouring to establish among ourselves a grand English school of law; for it contains a tolerable account of the successive establishment of the law schools of the different states, and of the struggles, difficulties and personal animosities which (in the case of the majority of them) attended their establishment and the organisation of their boards of lecturers and curricula of study. Happily, however, we manage those matters more sharply and less noisily in England; and we need not fear therefore, that any like acrimonious jealousies will assail our own Law University in the course of its establishment or afterwards; nor should the prospect of any such deter us from supporting it. For altogether the phenomena which this pamphlet describes as having occurred in the Harvard Law School, are phenomena which could not occur in England, being alike flighty, personal, and dishonourable, and such as even an Oxford "undergrad." would howl down at Commemoration.

Programme of the Land Tenure Reform Association, with an Explanatory Statement. By John Stuart Mill. London: Longmans. 1871.

Land Tenure Reform Association.—Report of the Inaugural Public Meeting, held 15th May, 1871. Mr. John Stuart Mill in the Chair. London: Higginbottom. Holborn. 1871.

ONE of the objects of this Association is to remove all legal and fiscal impediments to the transfer of land; another is to secure the abolition of the law of primogeniture; and a third is to restrict still further the right of entailing land. But the most characteristic object of all, is that which aims at intercepting from the present owners, or their vendees and successors, all the future unearned increase of the rent of land, or, at all events, a large part of that increase. The ulterior, or professed ulterior objects, are to encourage co-operative

agriculture, to promote the increase of small farms and the prosperity of their cultivators, to utilize the Crown lands, and the lands of charitable and other endowments or corporations in or towards the improvement of dwellings for the poor and the working classes, and to apply waste lands to national uses, so far, at least, as they would be better in cultivation than in their present waste condition.

These objects, both the immediate and the ulterior ones, are thought to be the natural outcome of the Reform Act of 1867, it being assumed or expected by the supporters and members of the Association, that the revolution which has taken place in the holders of political power ought, logically, to be followed by a like revolution in the holders of landed property, which has always hitherto been primarily associated with, and essentially related to, the former. Clearly, therefore, the Society is a political one, and, as being so, its particular objects are without the purview of this Magazine; we refrain, therefore, from criticising their particular character or particular feasibility, only remarking generally of them, that the one revolution would only be consistent with the other, and probably, therefore, wants only time to be accomplished.

Curiosities of the Law Reporters. By Franklin Fiske Heard.

Boston: Lee & Sheppard. 1871.

THIS amusing little volume contains a collection of legal waifs and strays on the subject of the eccentricities of the law and lawyers generally. It is made up of short paragraphs stating briefly the peculiarity attaching to the subject of them, and appears to have been gleaned principally from the reports of cases themselves, though in all probability the author has picked up a deal of his information from other sources. The "*Albany Law Journal*," for instance, since the issue of its first number some two years ago, would furnish a host of anecdotes of the kind.

A casual glance at the volume brings to our mind many quaint sayings of judges with which we are already familiar, many of these contain dictums of law which are now in full force. Tit-bits from arguments of counsel, when either comical or eccentric, is here noted.

The catch introduced by Sir James Burrow into the Report of the *King v. Norton*,* on the woman and her settlement, is given as a specimen of legal poetry: and the judge's recital of old rhymes suggestive of the signification of the word "team" in the case of *Duke of Marlborough v. Osborn* † as a matter of fact on which to found a judgment, finds a place. The peculiarities of the Statute Law form also a portion of the contents.

The volume is certainly amusing, made up as it is of a medley of legal whimsicalities, and in this way may serve to while away a few half hours of professional leisure, but for any practical purpose we do not know of what service the book can be to the profession.

An Index, we think, would not have been out of place.

* Burrow's S.C., 124.

† 5 Best & Smith, 67.

Beeton's Handbooks of the Law relating to Property, and of the Law relating to Women and Children. Nos. 1 and 2. London : Ward, Lock & Tyler. 1871.

THE above are the two first of a series of handbooks on legal subjects, written, or we may say compiled, for the express purpose of imparting a knowledge of the law to the general public. On this head, though much legal and useful information to the non-professional is to be gleaned from the volumes before us, it is modestly stated in the preface, that the pages "while intended to increase people's knowledge concerning our laws, are by no means designed to supersede such legal advice and assistance as every wise man would seek for in cases of doubt and difficulty." This probably accounts for the absence of reference to cases.

A general knowledge of the Statute Law is a subject of public importance, and there is no doubt all classes should be made familiar with it. The Common Law, equally as important, is too dangerous a weapon to handle by any but the qualified practitioner. Nevertheless, an insight into some of its rules may have a deterrent effect on the minds of some, and more with this object, than any other, has this cheap series been printed for public use.

The legal text books and digests render the materials for such a work easily accessible, the mechanical arrangement being the chief feature in the work.

The contents under the various headings are methodically arranged, and a voluminous index gives a ready reference at any moment to the subject of inquiry.

The Life and Times of Henry, Lord Brougham, written by himself.

In three volumes. Vol. II. Edinburgh and London : Blackwood & Sons. 1871.

IN our last number we devoted an article to the first volume of Lord Brougham's Autobiography, and we propose having another article on the completion of the publication. Meanwhile, we can only say that the present volume is more interesting than the former. It embraces the Orders in Council, and the Queen's Trial, and comes down to 1829.

The Reign of Law. By the Duke of Argyll. People's Edition. London : Strahan & Co. 1871.

WE particularly rejoice in the publication of the Duke of Argyll's well-known work in this cheap and universally accessible edition of it. It is true the work contains many things which are (for, in fact, the majority of its contents are) beyond our province, excepting so far as, in the words of Cicero, all the arts and all the sciences have a certain unity or convergence towards or amongst one another. It seems to us, however, that the contents of the seventh chapter of

his Grace's work, "Law in the domain of Politics," is not only nearly connected with our proper subjects, but is in fact peculiarly suggestive at this period of our history, especially of considerations regarding the nature and the province of law, that we shall recur to it in our next issue at length, and in an article upon his Grace's work, which is peculiarly consonant with our own views in the matter, we shall consider the true relations of positive law or of positive institutions to the Law Natural or Law Divine. We shall also hope then to reconcile, in the manner indicated by his Grace, these two species of law—the *κινητὰ* with the *ἰσως ὁν κινούμενα* of Aristotle—and at the same time to refute, or at least to question, the opinions of Mr. John Stuart Mill in this matter, who boldly declares, in one of his dissertations, that natural law, so long as it shall be retained in the theory of law, will be contradictory to the principles of every system of law, for every system of law having grown up under conflicting interests, is necessarily full of conflicting principles.

PUBLICATIONS RECEIVED.

The Journal of Jurisprudence and Scottish Law Magazine.

The Law Times.

The Irish Law Times.

The Law Journal.

The Albany Law Journal.

The Canada Law Journal.

The Australian Jurist.

The National Bankruptcy Register, U.S.

The Pittsburgh Legal Journal.

Events of the Quarter.

THE CONTAGIOUS DISEASES ACTS.

THE Acts of 1864, 1866, and 1869, for the prevention of the spread of contagious diseases, passed through Parliament without attracting much notice. The two former were regarded as measures of sanitary police for the benefit of the Army and Navy; the last provided for extending the operation of the Acts to any locality the inhabitants of which should make application to that effect and provide adequate hospital accommodation. An active and influential organisation was arrayed against the Acts in 1869. The House of Commons was moved to repeal them, and a Royal Commission was appointed to inquire into their operation. The report of this Commission has been issued. No less than eighty witnesses were examined, and the Commission permitted the presence at their meetings of representatives of the two societies which have been formed for the purposes respectively of extending and of repealing the Acts. These gentlemen had the opportunity of watching the proceedings, and of suggesting witnesses to be examined. The report notices, at the outset, the means adopted by some of the opponents of the Acts to bring them into public odium by making charges of misconduct against the police in putting the law in force. The Commissioners have made inquiry into every case in which names and details were given. In some cases the persons who publicly made these statements have refused to come forward to substantiate them; in others the explanations have been hearsay, or more or less frivolous. The result has been to satisfy the Commissioners that the police are not chargeable with any abuse of their authority, and that they have discharged a novel and difficult duty with moderation and caution. With regard to the evil to be dealt with, the Commissioners have received much evidence. They find that improved treatment has of late years mitigated the virulence of the disease to which these Acts of Parliament relate, and the more cleanly habits of the people may have diminished its prevalence; but it is shown on the highest authority that it is still a disease of a most formidable description—the source of many diseases formerly referred to other origins, infecting innocent persons, and causing a number of children to be born quite unfit for the work of life. With regard to the measures for the repression of this disease, the statistics seem to show that since the introduction of the system in 1864 the more serious form of the disease has diminished, while the other form has increased. So far as the Army and Navy are concerned there is a general impression on the part of the medical officers of both services that the Acts passed have operated

beneficially on the health of the men. Dr. Balfour has been induced by experience to change his view entirely as to the probable success of the Acts in repressing constitutional syphilis; and he states that the working of the Acts has been decidedly beneficial, and that the periodical examination of the public women is, in his opinion, essential. The same general inference may be drawn from the fact that among the witnesses summoned at the instance of the Association for the repeal of the Acts there was no medical officer of either service. Were the physical aspect of the question alone to be considered the Commissioners would feel it their duty to recommend the extension of the enactments to the general population, or at least to the large towns. But an inquiry into the moral and political bearings of the Acts introduce considerations of more doubt and difficulty. The diminution of the number of women practising public solicitation in the protected districts is a material gain to public decency and morality, and a sensible improvement has been observed of the conduct and demeanour of the women in the streets; this amelioration is attributable in some degree to the general improvement of manners and habits, but the Contagious Diseases Acts have purged the towns and encampments to which they have been applied of miserable creatures who were masses of rottenness and vehicles of disease, providing them with asylums where their sufferings could be temporarily relieved, even if their malady was beyond cure, and where their better nature was probably for the first time touched by human sympathy. Many of the women, on their discharge from the hospitals, have been induced to enter the refuges and homes which are ready for their reception. The proportion of women reclaimed directly or indirectly by the operation of the Acts referred to must be considerable; the inspector of police charged with the enforcement of the Acts in the Devonport district is satisfied, after inquiries made, that 90 per cent. of the women removed from the register have ceased to be prostitutes. The deterrent effect of the Acts has been very important. They operate to prevent an accession of fresh women from the ranks of the respectable into the number of the immoral. Several witnesses gave instances within their personal knowledge, in which women and girls have been restrained by the fear of coming within the operation of these Acts. Inspector Annis, of the Devonport district, mentions the total disappearance from the brothels and the streets of 200 or 300 girls of from thirteen to fifteen years of age. If such results have been obtained either wholly or partially through the operation of the Acts, those who demand their absolute repeal are bound to show that they have produced evils to counterbalance the good which, after all reasonable deductions have been made, may be fairly attributed to them. It is objected that the result of the Acts is to permit immorality without attendant hazard; on the other hand, it is urged that it is the duty of the State to maintain the Army and the Navy in the highest possible state of physical efficiency, and that camps and seaports are so especially the resorts of a dangerous class as to justify exceptional regulations, strictly guarded. The principal objection, however, seems to be to

the periodical examination, which is the most efficacious means of controlling disease. The Commissioners consider that it would be difficult, if not practically impossible, to make this system general throughout the country, even if it were desirable to do so, and that to a few favoured places the remedy for a disease which is general would not be possible. They are, therefore, brought to the question whether these Acts shall be repealed, or whether some modification of them may not be recommended by which they might be stripped of their anomalous and offensive character without materially impairing their efficiency.

The Commissioners think that such modification may be arrived at. There is evidence that the Act of 1864, if allowed fair play, could work with vigour and efficiency. It applied to certain naval and military stations, and dealt only with disease. No proceedings were taken unless there was evidence to satisfy a magistrate, upon the information of a superior officer of police, that the woman was a fit subject for medical examination; and no woman could be detained in a certified hospital except by a magistrate's order founded on the certificate of the medical officer that she had a contagious disease. The evidence showed to the Commission that the women are willing to submit to treatment when disabled by disease, but that under a voluntary system they leave the hospital upon temptation from without or even from mere weariness of confinement. The Commissioners state their view as follows:—

“Many of the witnesses before the Commission, who upon various grounds, but always upon those of its alleged grossness and immorality, have expressed the strongest repugnance to the periodical examination of public women as practised under the Act of 1866, are, nevertheless, agreed that the detention of the women in the hospital for the completion of their cure is justifiable. It would be, indeed, to little purpose to provide hospital accommodation if they were to resort to them and to leave them at their pleasure. As regards voluntary applicants, there could be no objection to the patients being required to enter into an engagement to remain until discharged by the hospital authorities. We are assured, however, that few women would enter under such a condition; and it is urged that the liberty of the subject is invaded when a diseased prostitute is prevented from propagating disease and compelled to enter a hospital for the purpose of being cured. We think, however, the temporary suspension of personal freedom in this instance, such suspension being strictly measured by the time required to effect the patient's cure, and accompanied by no restraint unnecessary for such purpose, is not to be regarded as an infringement of a great constitutional principle. The periodical examination being abolished we would return to the proceedings taken under the Act of 1864, which dealt directly with the disease. We would continue in existence the certified hospitals already established, preserving carefully the provisions made for the religious and moral treatment of the patients, but we would regulate the dealing with prostitutes sent compulsorily to such hospitals according to the provisions, with some modifica-

tions to render them consistent with the control of the local authorities, of ss. 11-21 of that Act; and we would permit the said provisions to be extended to any town in the United Kingdom which should make requests for such extension, and should provide proper hospital accommodation for the reception of patients. The Acts of 1866 and 1869, with the exception of the sections relating to periodical examination, and with certain other exceptions hereinafter mentioned, should continue in force within the prescribed limits, and at any military camps which may be temporarily formed, as measures of sanitary police applicable to the Army and Navy."

The Commissioners would not allow any one to be detained in a hospital for more than three months. They would transfer the administration of the Acts from the Admiralty and War Office to the Home Department, and require the police employed to perform their duty in uniform. Stringent provisions are proposed against the use of public-houses and common lodging-houses for immoral purposes. There are provisions in existing Acts for the committal of women behaving in public in a riotous or indecent manner, or importuning and annoying passengers; and the Commissioners recommend that these clauses be strictly enforced, and that every person convicted under them be examined, and, if necessary, detained in a hospital for cure. Another recommendation made is that girls under sixteen brought up under the Vagrant Act, or found pursuing an immoral life, be sent to a home or industrial school, if they cannot be otherwise provided for to the satisfaction of a magistrate. In regard to the metropolis, the Commissioners observe that the garrison of London consists of more than 7000 men, and that they consort with a class of women described by a police surgeon as the "shame of humanity." It is suggested that until arrangements can be matured for comprehending the metropolis in general within measures to be applied to the population as a whole, aid should be given from the public funds to Lock hospitals, or hospitals having Lock wards, and that women admitted should be required to remain for the requisite period not exceeding three months. The Commissioners say:—

"The offenders who bring this affliction upon themselves by their own vicious indulgence may have no claim to the compassionate care of the State, but the numerous innocent persons who suffer from the disease are surely entitled to consideration. We venture to express our hope, therefore, that while due consideration is paid to the sentiments of the people in regard to prostitution, no misapprehension as to the real moral bearings of the question, and no want of courage, will be suffered to prevent the application of such remedy as may be practicable to this great evil. The firmness of a former Parliament withstood the storm of clamour with which the discovery of vaccination was assailed by the ignorance and prejudice of the day, and relieved posterity from a scourge which was the terror of earlier generations; and we would fain hope than an attempt to stay the progress of a plague scarcely less formidable in its ravages is not to be hastily abandoned."

The Commission was large, and the report has twenty-three

signatures. Sixteen of those who have signed it record their dissent from some part or other of it ; seven of these are of opinion that it does not go far enough in its proposed legislation against the evil to be met. They desire to see the Acts of 1866 and 1869 maintained in substance and in principle with some details corrected, and gradually and cautiously extended as circumstances may render possible and advisable.—*The Times*.

In our next number we shall have occasion, in an article, to refer at length to this report.

GRADUATION IN LAW.

The Journal of Jurisprudence and Scottish Law Magazine calls attention to a Report on this important subject which has been substantially adopted by a recent meeting of the University Council of Edinburgh. The Report points out that—

“The Faculty of Law has at present no graduates by examination in any of the Scotch Universities, except Edinburgh ; and even in Edinburgh has so few, that it necessarily occupies, in all University affairs, a position very inferior to that of the other Faculties. Its staff of professors is small in all the Universities ; and in this University, where it is more numerous than the others, it will not bear comparison with that of the minor Universities of Germany. The attendance of students in the classes of Scots Law and Conveyancing in Edinburgh is considerable, and the whole attendance in the Faculty amounts, on an average, to about 300 ; but graduation in law, for which, till recently, no opportunities were afforded, still continues to be very rare.

“Only fifteen gentlemen have taken the degree of Bachelor of Laws since the first examination in 1863, being an average of two a year ; and there does not appear to be any immediate prospect of the average increasing. In consequence of the gradual disappearance of the non-graduate members, whom the Universities Act of 1858 admitted to the Council, and of whom a considerable number were lawyers, there will soon be few members of that profession left in the Council, in which all professions should be fairly represented.

“The legal profession also suffers from the want of any University qualification by which its members might be united to each other, and commended to the confidence of the community. The various professional examinations, much improved of late years, afford a partial but inadequate substitute for such a qualification.

“Two attempts have recently been made to correct these evils, and to raise, through the agency of the Universities, the standard of legal education in Scotland ; the institution of the degree of Bachelor of Laws by the University Commissioners in 1862 ; and the passing of the Procurators’ Act in 1865.

“As regards the cultivation of the science of jurisprudence, and the interests of the Bar, there is reason to hope that the degree of Bachelor of Laws, according to the existing regulations, may ultimately satisfy the expectations of its founders. There is, however, a condition attached to the degree which renders it scarcely approach-

able by the other branches of the legal profession, and which is known to have prevented persons, otherwise well qualified, from standing for it. The condition referred to is, that no one shall be eligible for it who has not taken a degree in Arts. The degree in Arts in this University, which requires attendance generally of four, and, under the most favourable circumstances, of three years, in the Faculty of Arts, is necessarily, as a general rule, beyond the reach of young men who must serve an apprenticeship of at least three years in their respective professions. There are, beside, a considerable number of persons who form the resolution of following the profession of the law at an age when it would be too late to commence the curriculum necessary for a degree in Arts.

"Two privileges, highly creditable to its framers, were introduced by the 'Act to amend the laws relating to Procurators in Scotland' (28 and 29 Vict., c. 85) in favour of persons who have taken University degrees. 1st, The period of apprenticeship is reduced from four years to three in the case of persons who have taken a degree in Arts in any University of Great Britain or Ireland (§5). 2nd, No entrance examination is to be required in the case of persons who have taken a degree of Bachelor of Laws in any Scottish University (§11).

"Induced probably by these liberal provisions, a few country procurators have recently taken degrees in Law in the University; but it is believed that no Writer to the Signet, and only one Solicitor before the Supreme Courts, has as yet graduated in law. The Solicitors before the Supreme Courts have, however, introduced, in the present Session of Parliament, a Bill by which it is proposed to give similar privileges to persons who have taken University degrees. Graduation in Arts has no doubt become more common in the case of advocates; but many of these have English degrees, and do not belong to the Council of any Scotch University. In the case of members of the other branches of the legal profession, graduation in Arts, either at a Scotch or any other University, is still the rare exception.

"The Committee think it advisable that there should be a re-adjustment of the rules at present in force as regards graduation in law, with the view of making degrees in that Faculty attainable by all branches of the legal profession.

"The Committee accordingly recommend—I. That there should be two degrees in Law, granted by examination; the higher degree to be called Doctor of Laws (LL.D.) II. That, as regards the degree of Doctor of Laws—(1.) The degree of Master of Arts in a Scotch, or an equivalent degree in Arts in an English, Irish, or foreign University, should, as in the case with the present LL.B., be a preliminary: (2.) That attendance on all the classes in the Faculty of Law should be required; and (3.) That there should be an examination in law more severe than that at present required for the degree of LL.B. III. That, as regards the degree of Bachelor of Laws, there should be—(1.) In the case of candidates who have not taken a degree in Arts, a preliminary examination on special subjects, viz., Latin, Greek, or two modern languages, at the option of the candi-

date ; Logic, Moral Philosophy, Mathematics, any two of these three subjects at the option of the candidate. (2.) Attendance upon all the classes in the Faculty of Law ; and (3.) An examination in Scots Law and Conveyancing ; and in any two of the other subjects taught in the Faculty, one of which shall be Civil Law or Public Law."

The Committee add the suggestion that provision should be made for appointing extra-mural Examiners in Law. At the meeting of the University Council, the following motion was carried :—

"That the report of the Committee be submitted to the University Court ; that the Council represent to the Court that in their opinion it is advisable that the regulations with reference to degrees in law at present in force should be amended to the effect (1) of having two degrees in law ; and (2) of not requiring for the lower degree a degree in Arts as a necessary preliminary ; and, further, that in conducting the examination the Professors should have the aid of gentlemen who have themselves obtained a degree in law after examination."

PATENT LAW REFORM.

At a meeting of London patent agents, held on July 4, to consider the proposed changes in the patent laws, George Haseltine, M.A., in the chair, the following resolutions were adopted :—

"(1.) That the chief defects of the patent laws have arisen from a want of appreciation of the natural rights of inventors to the sole use of their inventions, an unreserved recognition of which rights must pervade every equitable patent system, and the true aim of patent legislation is to harmonise these individual rights with the material interests of the State.

"(2.) That the grant of patents to mere 'first importers' is an injustice to inventors, an injury to society as it induces the 'pirating' of inventions, and the reason for these grants no longer existing, legislation should confine the issue of patents to actual inventors and their representatives.

"(3.) That, in view of the benefits inventors confer on the public, and the expenses incident to the completion and introduction of new inventions, a patent for fourteen years is an inadequate compensation, and we deem it expedient to grant patents for a term of twenty-one years without the privilege of extension.

"(4.) That the patent laws impose penalties upon inventors in the form of excessive fees, which justice and public policy demand should be reduced to the amount requisite to defray the expenses of an efficient administration of a simple patent system, and fees of 10*l.* for the entire term—now 175*l.*—would yield more than sufficient for the purpose.

"(5.) That the defects of the present practice should be remedied by the adoption of equitable 'regulations,' and the introduction of the system of granting patents, at the risk of the applicants, without any official supervision of the specification or preliminary investigation of the merits of the invention.

"(6.) That the rights of patentees should be determined by a com-

petent tribunal, excluding all technical objections to the validity of the patent, and we deem it expedient to dispense with jurors and 'scientific experts' in patent suits.

"(7.) That these resolutions, signed by the chairman, be forwarded to the Parliamentary 'Select Committee on Letters Patent,' and such other publicity be given them as he may deem conducive to the success of a liberal measure of patent legislation.

LEGAL EDUCATION.

At a meeting of the managing committee of the Metropolitan and Provincial Law Association, on April 18, Mr. Benham in the chair, the subject of the Legal Education Association's proposal for establishing a law university was considered, and it was resolved, on the motion of Mr. Edwin W. Field, seconded by Mr. Tagart—

"That the principle of requiring examination before admission to practise having been first insisted upon by our branch of the Profession, it is gratifying to us as solicitors to find that the great value of this principle has been proved by experience, and that its importance is now so generally acknowledged.

"That the committee earnestly desires the establishment, under control of Government, of an examining body of faculty of law, whose certificate of fitness shall be indispensable to admission to the practice of the Profession in either of the branches into which it is now divided, and that such examination should be the same for all students, without reference to the branch of the Profession with which they may ultimately connect themselves.

"That while the body of solicitors would be willing to leave to any legal examining body the determination of the subjects, and amount of general and professional knowledge to be required from all who desire to practise the law, it would not, in the opinion of the committee, be desirable that such faculty or body should have power to insist upon the candidate for examination having been educated at any particular college or school, or on any particular system of instruction.

"That while, in the opinion of the committee, there should be only one examining body or faculty, which should be under control of Government, it may be found expedient to establish one or more public schools of education in the law, but such public schools should be open to all students, without distinction, in the course of instruction between the branches of the Profession which the students may propose to enter. And the committee is further of opinion that it would not be right that any faculty constituted for the examination of candidates should have the charge of any school or classes intended to prepare students for such examination.

"That so far as the objects of the Legal Education Association accord with the foregoing resolutions, the committee tender its cordial support.

"That these resolutions be communicated to the council of the Incorporated Law Society of the United Kingdom, and to the executive committee of the Legal Education Association."

THE following petition relating to a Law University has been numerously signed by the leading members of the Bar :—

To the Honourable the Commons of the United Kingdom of Great Britain and Ireland in Parliament assembled.

The humble petition of the undersigned members of the Inns of Court and Serjeants' Inn sheweth :—

“ That it is desirable in the interest of the legal profession and the public to place the general course of studies and the examinations preliminary to and requisite for admission to the practice of the law, in all its branches, under the management and responsibility of a legal university, to be incorporated in London, in the constitution of which the different branches of the legal profession should be suitably represented.

“ That the passing of suitable examinations in this university (or of equivalent examinations in the legal faculty of some other university of the United Kingdom) should be made indispensable to the admission of students to the practice of the bar, or to practise as special pleaders, certificated conveyancers, attorneys, or solicitors.

“ And that the benefits of the course of study and examinations to be afforded by the university should be offered to all classes of students who may desire to take advantage of them, whether intending or not intending to follow the legal profession, in any of its branches, and whether members or not of any of the Inns of Court.

“ That the objects aforesaid cannot be fully accomplished without the authority of Parliament.

“ Your petitioners therefore humbly pray your honourable House to take such measures for the accomplishment of the objects aforesaid as to your wisdom may seem fit ; and particularly that an Act may be passed enabling Her Majesty, in the event of Her Majesty being graciously pleased by her royal charter to incorporate a university for the purposes aforesaid, to provide by such charter for such of the objects aforesaid as cannot now be accomplished by the sole authority of Her Majesty.

“ And your petitioners will ever pray,” &c.

ADMIRALTY JURISDICTION.

UNDER the County Courts Admiralty Jurisdiction Act, 1868, an Order in Council has been issued, whereby it is appointed that from and after June 30, 1871, the Whitechapel County Court of Middlesex shall have Admiralty jurisdiction, and shall have assigned to it, as its district for Admiralty purposes, the districts of the County Court of Essex, holden at Rochford, Brentwood, and Romford ; of the County Court of Kent, holden at Dartford, Gravesend, Greenwich, and Woolwich ; of the Southwark County Court of Surrey, and of the Bow and Whitechapel County Courts of Middlesex ; and that the City of London Court, appointed by such order to have Admiralty jurisdiction, shall cease to have such jurisdiction.

GAME-LAW PROSECUTIONS.

A PARLIAMENTARY return just issued, states that the total number of summary convictions under the Game Laws in England and Wales during the year 1870 was 10,600, the greater number of which, 9,089, were for trespassing in the daytime in pursuit of game. For night-poaching and destroying game the convictions were 522. The total number of accused persons discharged was 2,103. Fifty-nine persons proceeded against by indictment for being out armed, taking game, and assaulting gamekeepers, were convicted, and thirty-six acquitted.

THE JURIDICAL SOCIETY.

THE anniversary meeting of the Juridical Society, was held on May 3. The Right Hon. the Lord Chancellor in the chair. In his address, his lordship referred to the anomalies of our real property law, the monstrous forms in use by conveyancers, the absurdity of many doctrines which are merely interesting to metaphysicians, but which prevail in our law; the practical injustice and inconvenience of having two sets of tribunals, and the present imperfect method of legislating to amend defects in the law.

BRISTOL TOLZEY COURT.

By an Order of Council, certain of the provisions of the Common Law Procedure Act, 1852, the Common Law Procedure Act, 1854, the Summary Procedure on Bills of Exchange Act, 1855, and the Common Law Procedure Act, 1860, which are exerciseable under the said Acts respectively by the Court or a judge thereof, are extended to the Tolzey Court and Pie Poudre Court at Bristol.

THE LATE SIR J. ROLT.

THE late Right Hon. Sir John Rolt, who died at his seat, Ozleworth Park, near Wootton-under-Edge, Gloucestershire, on the 6th of June, in the sixty-seventh year of his age, was the second son of the late Mr. James Rolt, a merchant of Calcutta, by Anne Braine, daughter of Richard and Margaret Hiorns, of Fairford, Gloucestershire. He was born at Calcutta, in the year 1804, and while still a youth was sent with his mother to England. Becoming a student at the Inner Temple, at the age of thirty-three, namely, in the year 1837, he was called to the Bar. The indefatigable manner in which he devoted himself to his work, soon secured for him a good share of legal business. In 1846, or within a little more than ten years after his call to the Bar, Lord Lyndhurst conferred upon him the honour of a silk gown, after which he obtained a considerable amount of commercial business, principally from Liverpool, for which his early commercial training admirably adapted him. In 1847 he was a candidate in the liberal interest, for the borough of Stamford, where he was defeated, and in 1852 he met with a similar fate when contesting for the representation of Bridport. Some few years later Mr. Rolt adopted the Conservative creed, and at the general election of 1857 he was returned as one of the members for the Western

Division of Gloucestershire, which he continued to represent in the Conservative interest down to the period of his elevation to the judicial bench in 1867. In 1866 Mr. Rolt was made Attorney-General, and on the death of Sir James Knight Bruce, in July, 1867, he was nominated one of the Lords Justices of Appeal, and a member of the Judicial Committee of the Privy Council, but in February, 1868, he was compelled, through illness, to resign his judicial post. Sir John Rolt, who was a magistrate and deputy-lieutenant for the county of Gloucester, was twice married, first in 1826, to Sarah, daughter of Mr. T. Bosworth, of Bosworth, Leicestershire, who died in 1850; and secondly, in 1857, to Elizabeth, daughter of the late Mr. Stephen Godson, of Croydon, which lady died in 1864. He has left issue, two sons and four daughters.

In our next number we shall refer to the subject of this notice at greater length.

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Easter Term, 1871.

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—William David Williams, John Nixon, and Charles Edward Wright.

The council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Williams, the prize of the Honourable Society of Clifford's Inn. To Mr. Nixon and Mr. Wright, prizes of the Incorporated Law Society.

The examiners have also certified that the following candidates, under the age of 26, passed examinations which entitle them to commendation:—Edward Field Cole, Hugh William Pearson, and Henry Saxelbye.

The council have accordingly awarded them certificates of merit.

The number of candidates examined in this term was 94; of these, 64 passed, and 30 were postponed.

Trinity Term, 1871.

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction:—George Gatey, Charles John Archer, William Burnett Esam, Edward Thomas Clarke, Edward Greatrex Davies, Griffith Jones, and William James Winstanley.

The council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Gatey, the Prize of the Honourable Society of Clifford's Inn. To Mr. Archer, Mr. Esam, Mr. Clark, Mr. Davies, Mr. Jones, and Mr. Winstanley, prizes of the Incorporated Law Society.

The examiners also certified that the following candidates, under the age of 26, passed examination which entitle them to commendation:—Edward Bouthflower, John Hewetson Brown, Joe Harrison, John Hollams, jun., B.A., and Richard Bremridge Toller.

The council have accordingly awarded them certificates of merit.

The examiners further announced to the following candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to certificates of merit if they had not been above the age of 26:—Edward Maitland, Joseph Dear Pinson, and Alfred Pointon.

The number of candidates examined in this term was 199; of these, 193 passed, and 6 were postponed.

BAR EXAMINATIONS.

Trinity Term, 1871.

At the General Examination of Students of the Inns of Court, held at Lincoln's Inn Hall, on the 17th, 18th, 19th, and 20th May, 1871, the Council of Legal Education awarded to Theodore Ribton, Esq., student of the Inner Temple, a studentship of fifty guineas per annum, to continue for a period of three years; Hugh Francis McDermott, Esq., student of the Inner Temple, an exhibition of twenty-five guineas per annum, to continue for a period of three years; John Watt Smyth, Esq., student of Lincoln's Inn; Daniel O'Connell French, Esq., student of the Middle Temple; James Dyer Tremlett, Esq., student of the Middle Temple; certificates of honour of the first class.

Nicholas Charles Lawrence Biale, Esq., student of the Middle Temple; Edward Bayfield, Esq., student of the Inner Temple; Anumdoram Borooah, Esq., student of the Middle Temple; Harry Whiteside Cook, Esq., student of the Middle Temple; William Decimus Englett Foulkes, Esq., student of the Middle Temple; George Wayne Gregorie, Esq., student of the Inner Temple; Sherlock Hare, Esq., student of the Inner Temple; Richard Howlett, Esq., student of the Middle Temple; Thomas Allen Hulme, Esq., student of Lincoln's Inn; John Frederic Lowder, Esq., student of Lincoln's Inn; Robert Alfred McCall, Esq., student of the Middle Temple; Robert Anderson Mowat, Esq., student of the Inner Temple; Robert Parry Nisbet, Esq., student of the Middle Temple; William Justin O'Driscoll, Esq., student of the Inner Temple; John Charles Pritchard, Esq., student of the Middle Temple; Edmund Robertson, Esq., student of Lincoln's Inn; Henry Watts Rooke, Esq., student of the Middle Temple; Thomas Watt Smyth, Esq., student of Lincoln's Inn; Charles Frederic Tobias, Esq., student of the Inner Temple; Hiram Shaw Wilkinson, Esq., student of the Middle Temple; and Charles Henri Louis Wilmott, Esq., student of the Inner Temple; certificates that they have satisfactorily passed a public examination.

July Examination

On the Subjects of the Lectures and Classes of the Readers of the Inns of Court, held at Lincoln's Inn Hall, on the 1st, 3rd, and 4th July, 1871.

The Council of Legal Education have awarded the following exhibitions to the unmentioned students, of the value of 30 guineas each, to endure for two years:—

Constitutional Law and Legal History.—Frederick George Carey, Esq., student of the Inner Temple.

Jurisprudence, Civil and International Law.—Joseph William Comyns Carr, Esq., student of the Inner Temple.

Equity.—Frederick George Carey, Esq., student of the Inner Temple.

The Common Law.—William Bennett Rickman, Esq., student of the Inner Temple.

The Law of Real Property, &c.—Robert Forster MacSwinney, Esq., student of the Inner Temple.

The Council of Legal Education have also awarded the following exhibitions of the value of 20 guineas each, to endure for two years, but to merge on the acquisition of a superior exhibition:—

Equity.—William Edwin Ormsby, Esq., student of the Middle Temple.

The Common Law.—Edward James Ackroyd, Esq., student of the Middle Temple.

The Law of Real Property &c.—William Frank Jones, Esq., student of Lincoln's Inn.

GRAY'S INN.—*The Lee Prize.*—The annual prize, amounting to 25*l.*, (an exhibition founded by the late Mr. John Lee, Q.C., LL.D.), for the best essay selected for this year upon the following subject:—"The Feudal Tenures, their Origin, their Nature, and the Causes which led to their Abolition"—was awarded to Mr. Walter Galt Gribbon, a student of the society; and the subject of the essay for the ensuing year was announced to be as follows:—"A Sketch of the History of the Mercantile Law of England from the Earliest Times to the Passing of the Mercantile Law Amendment Act, 1856."

CALLS TO THE BAR.

Easter Term, 1871.

LINCOLN'S INN.—William Frederic Lawrence, Esq., University of Oxford; Thomas Shute Robertson, Esq., B.A., Oxford; John Chaigneau Colvill, Esq., B.A. and Scholar, Cambridge; Michael Placid Lynch, Esq.; William Augustus Harris, Esq., B.A., Oxford; Edward Martin, jun., Esq., LL.B., Cambridge; Frederic Pollock, Esq., M.A. and Fellow, Cambridge; Edward Chitty, jun., Esq., M.A., Oxford; Henry Bailey Rowan, Esq., B.A. and Fellow, Cambridge; William Leatham Barclay, Esq., B.A., Cambridge; Gerald Augustus Robert Fitz-Gerald, Esq., M.A. and Fellow, Oxford; and William Walker, Esq.

INNER TEMPLE.—John Wilson Moore, Esq., Oxford; Reginald Garton Wilberforce, Esq.; Arthur Frederick Vincent, Esq., LL.B., Cambridge; Arthur Bott Cook, Esq., LL.M., Cambridge; Alexander William Mowbray Baillie, Esq., B.A., Oxford; Edward Conolly, Esq., B.A., Oxford; Clarke Arthur Irving, Esq., LL.B., Cambridge; Thomas Edwin Peel, Esq., B.A., Cambridge; Edward Annesley Owen, Esq., B.A., Cambridge; George Deas Inglis, Esq.; Cornelius Cardew Masters, Esq., B.A., LL.B., Cambridge; Edward William Tritton, Esq., B.A., Oxford; Frederick Revans Chapman, Esq.; Joseph John Dunnington Jefferson, Esq., M.A., Cambridge; William Ellerker Hart, Esq., B.A., Cambridge; Alexander Myburgh, Esq., LL.B., Cambridge; Richard Luck, Esq., M.A., Cambridge; and Martin Chapman, Esq.

MIDDLE TEMPLE.—Thomas Jones, Esq., of the University of Dublin, Assistant-Secretary to the Government of Bengal; Frederick John Caunter Ross, Esq.; Henry Wilson Worsley, Esq., B.A., Exeter College, Oxford; Horace Langton Davis, Esq., M.A., Worcester College, Oxford; Robert Alexander Gillespie, Esq., B.A., St. John's College, Cambridge; Bethune Horsbrugh, Esq.; Frederick John Fergusson, Esq.; and Thomas Goodman, Esq.

GRAY'S INN.—Redmond Uniacke Steele, Esq., of St. John's College, Cambridge.

